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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1036

ROBERT E. RUPPEL, dba YO-RO DIESEL SERVICE, INC.,

Petitioner,

v.

THE TRAVELERS INDEMNITY COMPANY,

Respondents.

Petition of Robert E. Ruppel, d/b/a Yo-Ro Diesel Service, Inc. for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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I N D E X

	Page
AUTHORITIES	i
PETITION FOR CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE FACTS	4
REASONS IN SUPPORT OF WRIT	8
CONCLUSION	22
CERTIFICATE OF SERVICE	25
APPENDIX A - DISTRICT COURT OPINION	26
APPENDIX B - COURT OF APPEAL OPINION	53
(1) ORIGINAL JUDGMENT	78
(2) JUDGMENT ON PETITION FOR REHEARING	98

AUTHORITIES

CASES:	Page
Albanese v. N.V. Nederl. Amerik Stoomv. Maats., 2nd Circuit, 1965, 346 F.2d 481, Appeal (on indemnity) dismissed, 382 U.S. 283, 86 S.Ct. 429, 15 L.ed 2d 327, (1966) ---------	22
Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 89 S.Ct. 1144, 22 L.ed 2d 371 --	11,22
Indemnity Insurance Co. v. California Stevedores & Ballast Co., 307 F.2d 513 (9th CCA, 1962) --------	3,13
Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731, 87 S.Ct. 1419, 18 L.ed 2d 488 ----------	11
Jennings v. U.S., 4th CCA, 374 F.2d 983, 986 ----------	20
Larson Construction Co. v. Oregon Automobile Ins. Co., 450 F.2d 1193, (9th CCA, 1971) ----------	3,13 15,16
McDaniel v. The Lisholt, 365 U.S. 814, 5 L.ed 2d 692, 81 S.Ct. 694 ----	10
Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 4 L.ed 2d 941, 80 S.Ct. 926 ----------	11

	Page
Moragne v. States Marine Lines, 398 U.S. 375, 26 L.ed 2d 339, 90 S.Ct. 1772 (1970)	11,22
Pope & Talbot, Inc. v. Hawn, (1953) 346 U.S. 406, 98 L.ed 143, 74 S.Ct. 202	9,10,12
Rogers v. U.S. Lines, 347 U.S. 984, 98 L.ed 1120, 74 S.Ct. 849	10
Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp. (1956), 350 U.S. 124, 100 L.ed 133, 76 S.Ct. 232	10,15,24
Seas Shipping Co., Inc. v. Joseph Sieracki, 328 U.S. 85-108, 90 L.ed 1099	8,9
Tankrederit Gefion A/S v. Hyman-Michaels Company, (6th CCA, 1969), 406 F.2d 1039	19
Torres Cruz v. Hudson Steamship Co., (1st Circuit, 1963), 314 F.2d 44	22
The Tungus v. Skovgaard, (1959), 358 U.S. 588, 3 L.ed 2d 524, 79 S.Ct. 503	10
Union Carbide Corporation v. Goett, 361 U.S. 340, 4 L.ed 2d 341, 80 S. Ct. 357, reaffirmed 278 F.2d 319, cert. denied, 364 U.S. 826, 5 L.ed 2d 55, 81 S.Ct. 64	9

Page

United New York & N.J.S.H.P. Asso. v. Halecki, (1959), 358 U.S. 613, 3 L.ed 2d 541, 79 S.Ct. 517 ---------- 9

Waterman S.S. Co. v. Dugan & McNamara, Inc., (1960), 364 U.S. 421, 5 L.ed 2d 169, 81 S.Ct. 200 ---------- 10

West v. United States (1959), 361 U.S. 118, 4 L.ed 2d 161, 80 S.Ct. 189 ---------- 9

Whisenant v. Brewster-Bartle Offshore Co., 446 F.2d 394, (5th CCA) --------- 20

Zidell v. Travelers Indemnity Co. 264 F.Supp. 496 (D.C.Oregon 1967) ---- 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. _____

WILSON J. PARFAIT

versus

JAHNCKE SERVICE, INC.

ROBERT E. RUPPEL, d/b/a
YO-RO DIESEL SERVICE, INC.

THE TRAVELERS INDEMNITY COMPANY

HOME INDEMNITY COMPANY

Petition of Robert E. Ruppel, d/b/a
Yo-Ro Diesel Service, Inc. for a
Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR CERTIORARI

Petitioner, Robert E. Ruppel, d/b/a
Ro Diesel Service, Inc., respectfully prays
t a writ of certiorari issue to review the
gment and opinion of the United States
rt of Appeals for the Fifth Circuit,
ered in this proceeding on August 31, 1973.

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 347 F. Supp. 485. The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported. Copies of the opinions and judgments of the District Court and Court of Appeals are attached hereto as Appendix A and Appendix B.

The opinion of the United States District Court for the Eastern District of Louisiana was rendered on July 21, 1972. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 31, 1973, with two parties, Robert Ruppel, d/b/a Yo-Ro Diesel Service and the Home Indemnity Company subsequently filing petitions for re-hearing. Yo-Ro's petition for rehearing is attached hereto as part of Appendix B. On October 24, 1973 a judgment, with opinion, was rendered on the petition for re-hearing filed by Robert Ruppel d/b/a Yo-Ro Diesel Service, Inc., a copy of which is also attached hereto and made a part of Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1.

Whether a ship repairer's General Liability Insurance Policy excluding

> "(h) bodily injury to any employee of the insured arising out of and in the course of the employment by the insured,"

covers a claim asserted against the ship repairer, not by its injured employee directly, but by the ship owner held liable for the injury on account of an unseaworthy condition attributable to the ship repairer?

2.

Whether the decision of the Court of Appeal is inconsistent with the cases of Indemnity Insurance Co. v. California Stevedores & Ballast Company, 307 F.2d 513 (9CCA), (1962), and Larson Construction Co. v. Oregon Automobile Insurance Company, 450 F.2d 1193, (9CCA), (1971).

3.

Whether a settlement between the injured employee, as plaintiff, and the vessel, may be consummated when Court convenes for trial, without reasonable communications to the ship repairer, with due notice of settlement, deprives the ship repairer of due process of law?

4.

Whether the ship repairer is liable when the vessel created the unseaworthy condition? (5CCA opinion, p. 489).

5.

Whether sufficient evidence was presented in a non-jury case by the plaintiff, when the Court of Appeals states that his testimony had been impeached?

STATEMENT OF THE FACTS

The plaintiff, was an employee of Robert Ruppel, d/b/a Yo-Ro Diesel Service, and was the shop foreman who occasionally did welding. The defendant is Jahncke Service, Inc., whose employees noted the engine was leaking water and they performed various operations and finally called upon Yo-Ro, third-party defendant, to do some welding. The welding machine was aboard the dredge owned by Jahncke, and the plaintiff, employee of Yo-Ro, had a simple operation of welding a stud. The maintenance of the engine belonged to Jahncke, whose employees turned off the fuel line, to avoid spurts of oil. Jahncke's employees disassembled the engine, and proceeded to clean the parts on the upper deck level. These parts were being cleaned with diesel fuel, out of a container containing diesel fuel, and the oiler and engineer proceeded with the operation of cleaning up the various parts, while the engine was dissambled. This cleaning operation was performed on the upper deck. While waiting for the parts to cool, the plaintiff walked down a catwalk area, up a ladder, and over to a washbasin where the men were cleaning the parts, washed his hands, and proceeded to walk back toward the ladder, when he slipped and fell where the men were cleaning the parts. The plaintiff proceeded to file claims with Longshoremen and Harbor Workers, asserting that he walked across the deck, and slipped in spilled diesel fuel. Discovery depositions were taken, and the plaintiff emphasized that the cause of his fall was due to the Jahncke men cleaning parts with diesel fuel, and the diesel fuel was spilled on the upper deck.

Subsequently, on the morning of trial, a settlement was made between the plaintiff, and the defendant, without communications of the amount to Yo-Ro until Court convened for trial, when it was announced that the vessel agreed to remit the sum of $74,635.84 to the plaintiff, without notice or approval by the ship repairer, Yo-Ro. At the trial, the plaintiff's testimony vacillated, and the plaintiff changed his tune to attempt to show the fault on Yo-Ro, instead of on Jahncke. The plaintiff's testimony was impeached at the trial of the matter, which the Court of Appeals recognized,

> "was the principal evidentiary source of the District Court's findings...and was impeached at the trial." (T-10, Court of Appeal's decision).

The maintenance of the vessel is performed by Jahncke's employees who usually do their own repairs, disassemble the engine, take care of the normal upkeep of the engine and Jahncke owned and operated the welding machine aboard the Manchac. Further, the Jahncke men continued to work right with the plaintiff in this matter, while he tendered to the minor welding operation. Additionally, diesel fuel was aboard the vessel and it was not brought aboard the vessel by Parfait. Further, the repairs were identified as being M.O.R. - minor operating repairs.

Jahncke urged a plea of contributory negligence, and filed a third-party action against Yo-Ro. Yo-Ro was deprived of the defense of contributory negligence by the ar-

bitrary settlement by Jahncke and Parfait, without notice or knowledge of Yo-Ro. Further, that the Jahncke employees were actively negligent by cleaning parts in a pathway, leaving fuel oil on the deck, and it was forseeable that someone may slip and fall. Yo-Ro urges that Jahncke was negligent and Jahncke's employees were actively negligent in spreading the fuel oil on the upper deck.

Further, the testimony of Parfait, a veteran litigant, who has seen 37 doctors for a pre-existing back injury, did give incredible testimony which contradicted himself on the cause of the fall at the time of his deposition, and at the time of the trial. His testimony vacillated and he was unable to sustain the burden of proof. Further, additional employees testified that the catwalk area was clean and Parfait acknowledged that the catwalk was not slippery.

The proximate cause of the injury was due to the unseaworthy condition caused by the ship's employees and not the ship repairer, (Court of Appeal opinion, T-3,

> "...the Jahncke employees disconnected a fuel line from which fuel oil was allowed to drip and accumulate on the catwalk adjacent to the engine, creating a dangerous condition."

and therefore, Yo-Ro is relieved from any type of indemnification.

Alternatively, in the event that Parfait

was somewhat negligent, which is denied, it is submitted the overwhelming amount of evidence shows that the real proximate cause of the matter was due to the fault of Jahncke by having diesel fuel oil present on the upper deck. Further, that Jahncke's employees continued to work with Parfait on the catwalk area and had actual knowledge of the conditions which may have existed.

Yo-Ro further shows that in the event that there is any liability, that Yo-Ro had insurance coverage, with Travelers Indemnity Company and Home Indemnity Company.

Yo-Ro shows that Travelers and Home both admit that they were called upon to defend Yo-Ro, and refused to defend. Accordingly, Yo-Ro asserts coverage, plus all costs and reasonable attorney's fees.

The Travelers issued an automobile and general liability policy, and Home Indemnity Company issued a workman's compensation and employer's liability policy, and the District Court found in Yo-Ro's favor, and against Travelers, recognizing coverage in favor of Yo-Ro, and against Travelers. Further, the ship repairer took out various liability policies - (1) covering direct employee claims, General Liability Policy in suit, wherein Travelers was obligated to pay all sums, and exclusions by Travelers were inapplicable and the ship repairer was obliged to warrant that the ship repairer's work would be done in a workmanlike manner.

Further, in view of the opinions entered

by the Ninth Circuit, as set forth hereinafter, the ship repairer had every right and reason to believe that the ship repairer would have coverage of all types of claims which may be asserted against it, inasmuch as the ship repairer took out various liability policies. Further, that the Fifth Circuit's decision is contrary to that of the Ninth Circuit, and a general liability policy exclusion of claims for employee injuries, has been extended to both the ship owner's indemnity claims as well as claims asserted by the employee, and the ship repairer is left uninsured to the extent of the amount of the settlement of $74,635.84.

REASONS FOR THE ALLOWANCE OF THE WRIT

Petitioner urges this Court to grant its Writ of Review, because of the inconsistencies of the interpretations of the Fifth Circuit Court of Appeal, and previous cases decided by the United States Court of Appeal for the Ninth Circuit. There exists a considerable amount of maritime and insurance litigation and there exists a need for conformity.

Petitioner urges and suggests that this Court grant its Writ, for the following reasons:

I.

In a line of decisions, starting with Seas Shipping Co., Inc. v. Joseph Sieracki, 328 U.S. 85 - 108, 90 L. Ed. 1099, numerous cases set out hereinafter, this Court has undertaken to define the legal and permissible contractual relationships among injured mari-

time workers (seamen, longshoremen, repairmen, etc.), shipowners, and independent contractors (stevedores, ship-repairers, etc.), and the latters' sub-contractors; the Court has undertaken to define relationships starting with Sieracki, supra, which decided that:

> "An employee of a stevedoring company engaged in loading a ship, injured while working aboard the ship by a defect in its equipment amounting to unseaworthiness, may recover damages from the shipowner."

Also, the Court has defined classic tests of the scopes of coverage by determining whether employees were in the service of the ship. Pope & Talbot, Inc. v. Hawn, (1953), 346 U.S. 406, 98 L.ed 143, 74 S.Ct. 202; and has gradually defined the legal contractual relationships among maritime workers. One engaged in an extraordinary cleaning operation was not covered by the doctrine of seaworthiness, see United New York & N.J.S.H.P. Asso. v. Halecki (1959), 358 U.S. 613, 3 L.ed 2d 541, 79 S.Ct. 517. An independent contractor engaged in extraordinary repairs during reconversion did not extend the seaworthy doctrine, and Halecki, supra, the warranty of seaworthiness had no application to a shore-based employee of an independent contractor injured while an overhaul was being made. See West v. United States (1959), 361 U.S. 118, 4 L.ed 2d 161, 80 S.Ct. 189.

Also, see Union Carbide Corporation v. Goett, 361 U.S. 340, 4 L.ed 2d 341, 80 S.Ct.

357, reaffirmed 278 F.2d 319, cert. denied, 364 U.S. 826, 5 L.ed 2d 55, 81 S.Ct. 64, where the Court held the seaworthy doctrine did not extend to an employee of a repairer who drowned while sandblasting the deck surface of the defendant's barge, when he fell off the barge into the water.

Also, in The Tungus v. Skovgaard, (1959) 358 U.S. 588, 3 L.ed 2d, 524, 79 S.Ct. 503, it was held that one, not an employee of the vessel, on board an oil carrying ship, to repair a pump, and his status was indistinguishable from that of the carpenter in Pope & Talbot Inc., v. Hawn, supra. Also, it has been recognized that the shipowner's liability extends to longshoremen injured as a result of aspects of unseaworthiness brought about by the acts of a stevedore company, or the latter's servants. Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., (1956), 350 U.S. 124, 100 L.ed 133, 76 S.Ct. 232.

Also, the Court granted plaintiff's petition for a Writ of Certiorari, in Rogers v. U.S. Lines, 347 U.S. 984, 98 L.ed 1120, 74 S. Ct. 849, where the plaintiff employee of a stevedoring company was injured while unloading the defendant's ship, when struck by a tub being hoisted by another employee.

Also, the rights of indemnity have been recognized, see Waterman S.S. Co. v. Dugan and McNamara, Inc., (1960), 364 U.S. 421, 5 L.ed 2d 169, 81 S.Ct. 200. Also, see McDaniel v. The Lisholt, 365 U.S. 814, 5 L.ed 2d 692, 81 S.Ct. 694, where libel by a fireman against the vessel held there is no duty to furnish a sea-

worthy vessel to firemen on vessel, knowing it to be unseaworthy. Also, this Court stated that in maritime law, there is no distinction between duty owed to an invitee and duty owed to a licensee.

This Court has stated that it is a constitionally based principle that Federal Admiralty Law should be a system of law coextensive with, and operating uniformly in the whole country. Moraghe v. States Marine Lines, 398 U.S. 375, 26 L.ed 2d 339, 90 S.Ct. 1772 (1970).

Also, see Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 22 L.ed 2d 371, 89 S.Ct. 1144, where a stevedoring contractor's warranty of workmanlike service extends to a shipowner in the absence of contractual privity between the parties.

Also, the Court is always interested in the extent of the knowledge of the vessel, Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 4 L.ed 2d 941, 80 S.Ct. 926

Also, see Jackson v. Lykes Bros. Steamship Co., Inc., 386 U.S. 731, 733, 87 S.Ct.1419, 18 L.ed 2d 488, where the doctrine of unseaworthiness was extended to longshoremen, although longshoremen was entitled to the comp benefits under the L&HW Act.

The foregoing reflects a profound concern and interest by the Court in defining the maritime relationships, in the absence of applicable Congressional Legislation, under the constitutional provision investing admiralty jurisdiction in the Federal Courts, which juris-

dictional grant vests the Federal Courts with authority to create substantive rules of maritime law. See Pope & Talbot, Inc. v. Hawn, 98 L.ed 145, 346 U.S. 406, 74 S.Ct. 202, where Courts purporting to enforce Federally created rights, must apply the contents of those rights as determined by the Supreme Court.

Further, the case at bar involves the scope of coverage of standard policy clauses applicable in this situation, presents a facet of this inter-relationship, and an authoritative resolution of the question as to which would be a logical continuation or extension of this Court's series of decisions in this area; and that the importance to the interest involved of such authoritative resolution is heightened by the direct conflict of the Fifth Circuit's decision with those of the Ninth Circuit, and the fact that the Fifth Circuit's decision below, by giving the underwriter the benefit of the doubt arising both from its own failure, despite the pre-existing Ninth Circuit decisions, to specify the scope of the main exclusion clause, and from the interplay of the two exclusions (either of which could be read as an exception to the other, as the District Court and the Court of Appeal contradictorily did), puts a premium on the very type of policy ambiguity which the rule of strict construction against the insurer is designed to discourage. Therefore, the question presented for review as to whether a ship repairer's General Liability insurance policy excludes bodily injury to an employee of the insured, arising out of and in the course of the employment by the insured, covers a claim against the ship repairer, not by its injured employee directly,

but by the ship owner held liable for the injury on account of an unseaworthy condition attributable to the ship repairer would be a logical extension of the Supreme Court's decisions, set forth hereinabove, which have defined the legal and permissible contractual relationships, and liabilities, among the injured maritime workers, shipowners, and independent contractors.

The ship repairer was obliged to warrant that work would be done in a workmanlike manner, in accordance with implied-in-law warranties, announced by this Court in Ryan. Warranty continues to exist on behalf of the ship repairer, that the work would be performed in a workmanlike manner. The policy provides that the exclusion shall not apply to the warranty that the ship repairer was obliged to give. It is submitted that inasmuch as the warranty was due by the ship repairer that the exclusion is inapplicable.

II.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEAL IS INCONSISTENT WITH THE CASES OF Indemnity Insurance Co. v. California Stevedores & Ballast, 307 F.2d 513, (9th CCA, 1962), AND Larson Construction Co. v. Oregon Automobile Insurance Co., 450 F.2d 1193 (9th CCA, 1971), AND Zidell v. Travelers Indemnity Co., 264 F.Supp. 496 (D.C. Oregon) (1967).

The Larson and Indemnity cases, supra, decided by the Ninth Circuit Court of Appeal, over a span of one decade, has exclusionary language similar to the language contained in the policy issued by Travelers herein, and the

above jurisprudence held that the exclusions were confined to suits directly by employees against the insured. Policies were held to provide coverage on third-party indemnity claims. Obviously, the Fifth Circuit decision is in conflict with the decisions of the Ninth Circuit, and it is submitted that the Court should grant and allow a hearing to resolve the conflicts between the Circuits. The particular exclusion of the Travelers policy reads:

> "This insurance does not apply to (h) bodily injury to an employee of the insured arising out of and in the course of the employment by the insured."

The claim against the ship repairer's General Liability policy was made by the vessel and not by the employee. The shipowner was held liable for the injury on account of the unseaworthy condition attributable to the shipowner and the ship repairer. These are the same facts that occurred in the Ninth Circuit. A uniform law is needed and is desirable and the Ninth Circuit has held that policy exclusions of injuries to employees is confined to direct employee claims. Further, the Court held that it does not exclude coverage to third party claims unless the exclusions are clearly and unmistakably defined in order to make an effective exclusion. Exclusion (a) specifically specifies that with

> "respect to bodily injury, or property damage occurring while work performed by the named insured is in progress, this

> exclusion does not apply to a warranty that such work will be done in a workmanlike manner."

The Ryan doctrine emphasizes that the ship repairer is obliged to warrant his work in a workmanlike manner. The exception to the exclusion specifies that this very type of Ryan indemnity is applicable.

The Larson Court considered specifically exclusion (c) which provided:

> "...bodily injury of an employee of an insured arising out of and in the course of employment by the insured..."

This is the gravamen, the sum and substance of the matter under consideration, and it is the heart and soul of the Larson case, and the case at bar.

LANGUAGE CONTAINED IN LARSON POLICY:	LANGUAGE CONTAINED IN YO-RO'S (TRAVELERS) POLICY:
"Coverage A-Bodily Injury Liability. The policy excludes from this coverage: (b)...liability assumed by an insured under any contract or agreement...; (c)...bodily injury of an employee of an insured arising out of and in the course of..	"Coverage A-Bodily Injury Liability. This insurance does not apply: (h) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured."

...employment by an
insured..."

In the Larson case, supra, the Court stated:

> "The problem here arises because the exclusion does not refer to all sums which the insured shall become legally liable to pay as damages because of bodily injury liability, but simply makes the coverage inapplicable to '... bodily injury to any employee.' As we see it, the language of the exclusion is somewhat narrower than the language of the insuring clause and while the meaning is not clear, the exclusion could be interpreted to refer to no more than the damages suffered by the employee himself. Because of workmen's compensation and similar laws, the employee presents a special kind of risk ordinarily insured by a special policy devoted exclusively to that risk, or in some cases by deposits ordered by the officers administrating the workman's compensation or similar law. A person examining exclusion (c) might reasonably believe that it was intended to exclude only that special employee hazard nor-

mally covered by that special policy. In view of the special treatment of the employee hazard, the differences between the words used in the insuring and the exclusion clauses and the fact that the risk was a known risk, we hold that the exclusion (c) was not spelled out with sufficient certainty to eliminate the coverage in this case."

Continuing, the Court stated:

"The result which we reach is in accord with, although not compelled by, the decision in Indemnity Ins. Co. v. California Stevedore & Ballast Co., 307 F.2d 513 (9th Cir. 1962). In that case the Court relied upon the existence of a contract between the stevedore and shipowner and a clause in the policy assuming liability under written contracts. <u>There is no contract here</u>. Notwithstanding, we hold that if the liability of the stevedore to the shipowner is not to be insured in a comprehensive liability policy then that risk should be excluded in unmistakable terms no matter what words may be used to rationalize the imposition of the stevedore's liability.

Accordingly, it is requested that the District Court's judgment holding that the policy of Travelers covered Yo-Ro's obligation be reinstated, and the Writ be granted.

III.

The ship repairer has been deprived of due process of law as the injured employee and the vessel settled their claim with notice to the Court on the morning of trial, without reasonable communications to the ship repairer and over the ship repairer's objection.

The settlement by the employee and the vessel was not submitted to the ship repairer, and the ship repairer was not timely advised with a reasonable opportunity to defend in accordance with due process of law. The settlement was made, and the Court was notified without previous notice to counsel, when the Court called the matter to trial. Objection by the ship repairer was urged immediately, (T-239 when the ship repairer first became aware of the settlement figure in the amount of $74,635. The ship repairer objected, and never approved the settlement (T-239 and T-383). Further, there are elements of unfairness to the indemnitor-ship repairer, particularly, when there was a secret settlement by the vessel, when they tendered the settlement figure to the injured plaintiff employee, without knowledge to Yo-Ro, and prevailed upon the injured employee to change his testimony which the Court acknowledges was impeached. See the Court of Appeal's opinion, (T-10). This is indeed bad law for the indemnity vessel to make secret arrangements with the plaintiff, and literally

dangle the settlement figure in front of his face, and refuse to deliver the proceeds until after the injured employee changes his testimony, and so testifies under oath, gives perjured testimony, all of which was acknowledged to have been impeached by the Court of Appeals. These are elements of distinct unfairness to the indemnitor, and creates hazardous and chaotic situations, and is bad law, for which the ship repairer should not be held responsible. See Tankrederit Gefion A/S v. Hyman-Michaels Company, (6th CCA, 1969) 406 F.2d 1039, which held that the indemnitee must show actual liability to recover against an indemnitor. It is submitted the indemnitor should not have to pick up the tab of the indemnitee, when the indemnitee decides to make a settlement without advising the exact amount, with a reasonable length of time to accept, or urge any defenses thereto. Particularly, the defense must be offered within a reasonable length of time, and not on the eve of trial.

The Court of Appeal acknowledges at page 16 of its opinion, that Tankrederit procedure was not complied with and that the indemnitee failed to tender the final settlement to the indemnitor. The proposed settlement in the amount of $74,635.84 was a secret settlement which was communicated to the Court, and was immediately urged as being objectionable by Yo-Ro (T-239, T-547). The sole communication by the indemnitee to the indemnitor was by letter dated January 20, 1972, delivered by hand, on the eve of trial, when the case was fixed for trial on January 24, 1972. This is obviously an unreasonable notice as no attorney can be expected to take over a defense

over the weekend. Any court that handles small claims affords defendants and attorneys a minimum of three working days within which to file answers. Shouldn't the ship repairer have a reasonable opportunity to notify their insurers?

The Fifth Circuit, in Whisenant v. Brewster-Bartle Offshore Co., 446 F.2d 394, (5th CCA) in an Enbanc hearing stated as follows:

> "The settlement with the heirs of the deceased by the barge owner without tendering the proposed settlement to the drill pipe testing company for approval, or offering it the opportunity to defend the action, required remanding such phase of the case for further proceedings."

Thus, the ship repairer, Yo-Ro, was denied due process of law.

Also, see Jennings v. U.S., 4th CCA, 374 F.2d 983, 986, which specified that:

> "The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and an opportunity to defend are the indispensable due process satisfying elements."

The ship repairer was denied an opportunity to defend as the vessel and the injured plaintiff reached a settlement for the sum of

$74,635.84, without communication to the ship repairer, and counsel certifies he did not have reasonable opportunity to defend, was unable to defend, and further, reasonable circumstances exists which are patently manifested by the indemnitee dangling the settlement figure in the amount of $74,635.84 in the face of the plaintiff, who then proceeded to testify with impeached and perjured testimony, which obviously was the result of the settlement having been made, which the Court of Appeals acknowledges was impeached testimony. Particularly, the foregoing should be considered in view of the fact that the vessel's employees were found to have,

> "disconnected a fuel line from which fuel oil was allowed to drip and accumulate on the catwalk, adjacent to the engine, creating a dangerous condition."

Thus, the vessel created the unseaworthy condition which existed, as determined by the lower courts.

IV. and V.

The ship repairer should not be liable when the vessel created the unseaworthy condition. The Court of Appeals adopted the opinion of the District Court, and acknowledged that the employees of the vessel,

> "disconnected a fuel line from which fuel oil was allowed to drip and accumulate on the

catwalk adjacent to the engine, creating a dangerous condition."

Accordingly, the ship repairer should not be liable when the vessel created the unseaworthy condition. Indemnity is not automatically granted to the shipowner. The shipowner's conduct may preclude its right to indemnity. Albanese v. N.V. Nederl. Amerik Stoomv. Maats., 2nd Circuit, 1965, 346 F.2d 481, Appeal (on indemnity) dismissed, 382 U.S. 283, 86 S.Ct. 429, 15 L.ed 2d 327, (1966). If the shipowner orders the stevedore to continue working in the face of known defects aboard the vessel, such as a defective winch, no indemnity was allowed. Torres Cruz v. Hudson Steamship Co., 1st Circuit, 1963, 314 F.2d 44.

The Supreme Court has held in Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 89 S.Ct. 1144, 22 L.ed 2d 371, (1969), that the Federal Maritime Law does impose a duty by the shipowner to the stevedoring contractor of due care under the circumstances.

It is respectfully submitted that the Writ of Review be granted in order to resolve the conflicts of the Circuits, and provide uniformity, as mentioned recently in Moragne case, supra, and so provide uniformity in the interpretations of similar policies.

CONCLUSION

It is submitted that serious questions have been presented for review, and the decision of the Fifth Circuit Court of Appeals

is erroneous, and disturbs the rule of uniformity desired for the various Courts of Appeal. Further, the decision is inconsistent within itself, and is inconsistent and contradictory to prior decisions of the United States Court of Appeal for the Ninth Circuit, and important considerations of maritime law, and the insurance applicable represented here, and in view of the jurisprudence cited hereinabove, and the concern of the courts for defining maritime relationships and its insurers' responsibilities, and the concern of the courts for defining these relationships which stem from its role as the ultimate fashioner rules in this area, in the absence of Congressional legislation, under the Constitutional provisions vesting admiralty jurisdiction in the Federal Courts, it is submitted that additional resolutions are necessary and opinions which will be a logical continuation or extension of the series of decisions which have been made.

Further, the importance to the interests involved of such authoritative resolutions are heightened by the direct conflicts of the Circuits, and the fact that the Fifth Circuit's decision below, by giving the underwriter the benefit of the doubt, arising from the underwriters failure, despite the pre-existing Ninth Circuit decisions, to specify the scope of the main exclusion clause, and from the interplay of the two exclusions (either of which could be read as an exception to the other, as the District Court and the Court of Appeals contradictorily did), put a premium on the very type of policy ambiguity which the rule of strict construction against the insurer

is designed to discourage.

The Ryan doctrine requires that the ship repairer warrant the performance of their work in a workmanlike manner, and the exception to the exclusion specifies that coverage exists and the exclusion "a" is inapplicable, as the exclusion "does not apply to a warranty that such work will be done in a workmanlike manner." The ship repairer has every reason to believe that coverage existed for the performance of his work which was warranted to the vessel.

It is respectfully submitted, that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the foregoing has been forwarded through the United States mail, postage prepaid, this 26th day of December, 1973, to counsel of record listed below.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON J. PARFAIT	CIVIL ACTION
VS.	NO. 69-225
JAHNCKE SERVICE, INC.	SECTION "I"

CONCLUSIONS OF LAW
AND
FINDINGS OF FACT

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and
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for plaintiff

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for defendant, Jahncke Service, Inc.

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for third-party defendant, Yo-Ro Diesel Service, Inc.

John R. Peters, Jr. and Herschel E. Richard, Jr., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, Louisiana

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M. N. Grossel-Rossi and Michael A. Britt,
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for third-party defendant
Home Indemnity Company

GORDON, District Judge:

On or about October 1, 1967, Wilson J. Parfair, a welder employed by Yo-Ro Diesel Service, Inc., was repairing a broken cylinder block on a diesel engine aboard the Diesel Dredge Manchac (hereinafter "The Manchac"), which was owned and operated by Jahncke Service, Inc. While he was working on the engine, Parfair slipped on the floor of the engine room causing serious injury to his back and neck.

As a result of this accident Parfait brought the instant action against Jahncke Service, Inc. (hereinafter referred to as "Jahncke"), based on the alleged unseaworthiness of The Manchac and the alleged negligence of Jahncke. Jahncke then filed a third party complaint against Parfait's employer, Yo-Ro Diesel Service, Inc. (hereinafter referred to as "Yo-Ro") seeking indemnification from Yo-Ro for any liability to Parfait that Jahncke might incur. Jahncke based its claim for indemnification from Yo-Ro on the theory that Yo-Ro had breached its implied warranty of workmanlike performance. Both Jahncke and Yo-Ro then filed third party demands against Yo-Ro's two insurers, Travelers Indemnity Company (hereinafter referred to as "Travelers") and Home Indemnity Company (hereinafter referred to as "Home"). The two insurance companies were made third parties so that any possible indemnification Yo-Ro owed to Jahncke would be covered by either or both insurance policies. Both insurance companies,

however, contend that there is no coverage under their policies.

Prior to the trial of this matter the main action between Wilson Parfait and Jahncke was compromised, and trial only as to the third party actions was conducted before this Court. At the conclusion of the trial the parties were required to submit additional memoranda on the issues before the Court, which are: (i) is Jahncke entitled to indemnification from Yo-Ro, (ii) is coverage provided for Yo-Ro's liability to Jahncke by Travelers' policy, (iii) is coverage provided for Yo-Ro's liability to Jahncke by Home's policy, and (iv) is the settlement between Parfait and Jahncke reasonable. The Court has decided the foregoing issues after consideration of the testimony and evidence presented at the trial, and the memoranda submitted by the parties.

Indemnification

Upon discovering that the main pump engine aboard The Manchac was broken, Jahncke contracted with Yo-Ro to weld the broken part. Parfait, the working foremen for Yo-Ro, came aboard the vessel to inspect the broken pump engine and determine what equipment should be used to make the repair. After completing his inspection Parfait left the vessel to obtain the tools and equipment needed for performance of the repair job. About two hours later Parfait returned with his son, Wilson J. Parfait, Jr., who was employed by Yo-Ro as an apprentice welder and was to assist his father in the welding job. While Parfait was gone Jahncke's employees had dismantled part of the engine to enable Parfait to perform his repair work, and, in so doing, the Jahncke employees disconnected a fuel line from which fuel oil was allowed to drip and accumulate

on a catwalk adjacent to the engine, creating a dangerous condition. The Jahncke employees were not aware that fuel oil had dripped and created a hazard. Parfait, while standing on the catwalk to work on the engine, noticed that fuel oil was dripping and that it had accumulated on the floor where he was working; however, he neither attempted to remove the oil nor did he request Jahncke's employees to clean it up.

After working for approximately two hours on the repair, Parfait reached a point where the weld had to cool before he could continue. He walked to the end of the catwalk and up a short ladder to the deck above and proceeded straight to a wash stand a short distance away. After washing his hands he returned, in the same direction from which he had come, and headed for the ladder leading down to the catwalk. As he neared the ladder he slipped and fell, either as a result of fuel oil on the soles of his shoes that had been picked up while he worked on the catwalk where fuel oil had accumulated, or as a result of fuel oil tracked on the steel deck by his shoes when he walked toward the wash stand.

Jahncke employees were cleaning engine parts in cans of fuel oil on the deck where the wash stand was located at the time Parfait walked to and from the wash stand. This activity, however, was well away from Parfait's path between the ladder and the wash stand and did not in any way contribute to the accident.

The accumulated fuel oil on the catwalk of The Manchac was a hazardous condition which rendered the vessel unseaworthy, Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960), and that

unseaworthiness was a proximate cause of the accident.

Yo-Ro, as a contractor aboard Jahncke's vessel, The Manchac, owed Jahncke, as owner of the vessel, a warranty of workmanlike performance. Whisenant v. Brewster-Bartle Offshore Company, 446 F.2d 394 (5th Cir. 1971).

The warranty of workmanlike performance was breached by Yo-Ro when it failed either to clean up the accumulated oil on the catwalk before its crew began working or to inform Jahncke personnel that its crew would not commence working until the accumulated oil was cleaned up. The Fifth Circuit in Burrage v. Flota Mercante Grancolombiana, 431 F.2d 1229 (5th Cir. 1970) stated:

> The notion of workmanlike performance certainly encompasses an obligation by the contractor to take notice of those deficiencies and hazards likely to give rise to damage to life, limb, or property and then take requisite action depending on the nature of the relationship of the parties and their contractual obligations, express or implied, either to eliminate or minimize the hazard or to stop work until the situation is corrected. 431 F.2d at 1232.

In Burrage, supra, the court found that a stevedore had breached its warranty of workmanlike performance when its longshoremen who were assisting in the unloading of a ship noticed beans spilled on the wharf. The longshoremen knew this condition was unsafe, and yet they did nothing about it. Furthermore, the Court said that the spillage did not have to be excessive. The condition had rendered

the vessel unseaworthy, and this was sufficient to compel a conclusion that workmanlike performance called for a stevedore to do something.

This Court must conclude that the Fifth Circuit's rationale and holding in Burrage, supra, is controlling. Yo-Ro breached its warranty of workmanlike performance when its working foreman, Wilson Parfait, after noticing the unseaworthy condition, the accumulated fuel oil on the catwalk, failed either to clean up the oil or to discontinue his repair work until it was removed by Jahncke's employees.

Yo-Ro argues that Jahncke's action for indemnification is precluded by certain conduct on its part; namely, the disconnection of the fuel line from which the fuel oil dripped. In Weyerhaeuser Steamship Co. v. Nacirema Operating Company, Inc., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491 (1958), the Supreme Court indicated that conduct on the part of the shipowner could preclude contractual indemnification. The Fifth Circuit in Waterman Steamship Corp. v. David, 353 F.2d 660 (5th Cir. 1965), stated that contract principles are to be applied by the trier of fact to determine what conduct on the part of the shipowner will preclude indemnity.

In the instant case, although the unseaworthy condition was caused by Jahncke, Yo-Ro did nothing to remedy the hazardous condition that it noticed was present. A similar situation was present in T. Smith & Son, Inc. v. Skibs A/S Hassel, 362 F.2d 745 (5th Cir.1966), wherein the court held that negligence of the shipowner did not preclude indemnification. The stevedore's employee was aware of the condition and did nothing to correct it. The Fifth Circuit in Southern Stevedoring &

Contract Co. v. Hellenic Lines, Ltd., 388 F.2 267, 272 (5th Cir. 1968), stated:

> [Shipowner's] conduct, to preclude indemnity, must be sufficient to bar the enforcement of the contract. The vessel's unseaworthiness, although a proximate cause of the accident, is not in itself conduct necessarily sufficient to preclude recovery. Without entering the thicket of primary and secondary, or active and passive negligence . . . the trier of fact must weigh the substantiality of the fault of the shipowner against the breach of warranty by the stevedore to determine whether the former's conduct is "sufficient to preclude indemnity." (citations omitted).

This Court, after weighing the substantiality of the fault of Jahncke against the breach of warranty by Yo-Ro, is of the opinio under all of the circumstances, that any faul by Jahncke and unseaworthiness created thereb would not have prevented Yo-Ro from performin its operations in a workmanlike manner. Accordingly, it is held that Jahncke is entitle to indemnification from Yo-Ro.

The Travelers Indemnity Company Policy

At the time of Parfait's accident a Commercial Automobile - General Liability Policy (hereinafter referred to as the "Travelers policy") numbered KDS-6741447 was in effect between the insured, Yo-Ro, and Travelers. Yo-Ro argues that the policy provides coverage for the indemnification sought by Jahncke Travelers argues that either Exclusion (d) or Exclusion (h) of the Manufacturers' and

Contractors' Liability Insurance Coverage part of the Travelers policy vitiates any coverage.

Whether either or both of these exclusions relieve Travelers of coverage is a close and difficult question. Hence, the Court will not only state its decision, but will delineate in some detail the novel issues which are involved in interpreting the Travelers policy.

Exclusion (d) of the Travelers policy is generally referred to as the watercraft exclusion. It provides, in part:

> This insurance does not apply:
>
> * * * * * *
>
> (d) To bodily injury . . . arising out of the ownership, maintenance, operation, use, loading or unloading of any watercraft, if the bodily injury . . . occurs away from premises owned by, rented to or controlled by the named insured; but this exclusion does not apply to liability assumed by the insured under an incidental contract;

It is conceded by the parties that the accident occurred away from premises owned by, rented to or controlled by Yo-Ro and that liability was not assumed by Yo-Ro under an incidental contract; however, the parties contest whether Yo-Ro was performing maintenance within the meaning of the term's use in the watercraft exclusion at the time of Parfait's injury.

It is left to the finder of fact to determine whether the activity that Yo-Ro was

engaged aboard The Manchac was maintenance, and the Court finds that Yo-Ro, through its employees, was engaged in the repair of the main pump engine aboard The Manchac. This activity, however, did not constitute maintenance as the term is utilized in Exclusion (d) of the Travelers policy, but rather, the activity by Yo-Ro was in the form of simple repair work.

The leading case interpreting a watercraft exclusion is Grigsby v. Coastal Marine Service of Texas, Inc., 412 F.2d 1011 (5th Cir. 1969). In that case the Fifth Circuit considered a watercraft exclusion similar to the one contained in the Travelers policy and stated:

> [T]he policy is intended to exclude coverage when use or maintenance, loading or unloading of the vessel is that of the assured, and as between Underwriter and Assured, that depends on whose work was being done, what work was being done, and that adds up to the permissible conclusion of the Trial Judge that this was not here "maintenance of the barge by Welders." 412 F.2d at 1038.

Grigsby presented a factual situation in which a company known as "Coastal Marine" contracted with another company, "Welders," the insured, to supply a pump for the removal of water from the tanks of a barge which was being serviced by Coastal Marine. Coastal Marine was unsuccessful in its attempt to start the pump. A Welders employee came aboard the barge with two additional pumps and worked for approximately one hour until the accident happened.

Welders' insurer asserted that its policy did not provide any coverage for liability to Welders because of the watercraft exclusion contained therein. The court was compelled to find that Welders' employee at the time of the accident was engaged in ship repair work because of certain federal safety regulations. This finding on the part of the court, the insurer argued, also required the court to find that Welders was engaged in the "ownership, maintenance, operation, use, loading or unloading of" a vessel for which activity there was no coverage by virtue of the watercraft exclusion. In response the court stated:

> Many factors point in the other direction. While it is true that we have held that the work being done by Sonnier [Welders' employee] had the force of making his employer for that operation into one engaged in ship repairing so far as coverage of that Federal Act was concerned, this is a long way from holding that Welders was in fact or in law engaged in "maintenance" of the Barge. The "maintenance" was being performed by Coastal, and Welders' role was to supply the needed pumps. Additionally, if the literal reading were applied, it would exclude liability for damage to the vessel simply because of its status as one then undergoing "maintenance, operation, use, loading or unloading." 412 F.2d at 1037.

Yo-Ro argues that its activity aboard The Manchac was analogous to the activity of Welders in Grigsby. While this is a very close question, and although there are distinctions

between the role of Welders in Grigsby and the role of Yo-Ro in the instant case, this Court finds that the role of Yo-Ro here is closer to that of Welders than that of any of the other parties in Grigsby. It is true, for example, that in Grigsby Welders was found to be engaged in ship repair work because its activity came within the ambit of certain federal safety regulations. This Court feels, however, that even absent the federal safety regulations, had the court in Grigsby made the factual determination that Welders was engaged in ship repair work, the court would not have concluded that such isolated activity as that engaged in by Welders constituted "maintenance" as that term is used in the watercraft exclusion. Rather, this Court interprets Grigsby as requiring a finding of continuous or regular repair activity as a prerequisite to "maintenance" within the definition of the exclusion. The Fifth Circuit did, in fact, conclude that the continuous and regular activity of Coastal Marine in Grigsby constituted "maintenance."

In the instant case, the testimony of Willie Gordon, the Chief Engineer on The Manchac, establishes beyond doubt that the normal upkeep, repair and maintenance of The Manchac and its engine was performed by Jahncke personnel. Yo-Ro was called upon only when a repair required welding or turning the engine's crankshaft. Mr. Gordon could recall only three occasions when Yo-Ro had performed work on The Manchac. According to these facts, the activity of Yo-Ro here fits somewhere in between that of Coastal Marine and that of Welders in Grigsby, but this Court feels that it is more analogous to that of Welders. In Grigsby Coastal Marine had a specific contract with Aiple Towing, the owner of the barge in Grigsby, to service all of Aiple's barges calling

at the Olin Terminal. Yo-Ro had no written contract with Jahncke to perform any services whatsoever. Jahncke chose to perform its own maintenance of The Manchac. Yo-Ro only performed certain specialized repair work when requested to do so by Jahncke.

In reaching its conclusion that the activity of Yo-Ro was not maintenance under Exclusion (d) of the policy, this Court also has relied upon the doctrine of noscitur a sociis, a concept which requires that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. First National Bank & Trust Co. v. Lincoln Power Corp., 118 F.Supp. 340 (E.D. Okla. 1953). See also, Jarecki v. G. D. Searle & Co., 367 U.S. 303, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); Polaroid Corp. v. C.I.R., 278 F. 2d 148 (1st Cir. 1960); Wong Kam Wo v. Dulles, 236 F.2d 622 (9th Cir. 1956); Geer v. Birmingham, 88 F.Supp. 189 (N.D. Iowa 1950). Generally the courts have used noscitur a sociis in the area of statutory construction, but the concept is equally applicable in the area of insurance contract construction. 1 Couch on Insurance §15.70 (2d ed. 1959).

The words in Exclusion (d) which surround and are associated with the term "maintenance" are "ownership," "operation" and "use." Each of these words has a meaning that connotes a form of continuous activity. Thus, noscitur a sociis requires that "maintenance" should be interpreted in a similar manner, and, so interpreted, "maintenance" as used in Exclusion (d) means a more continuous activity than that engaged in by Yo-Ro.

As has been discussed, the Court has had difficulty in interpreting the watercraft exclusion of the Travelers policy. Just as the watercraft exclusion in Grigsby is "not

altogether free from doubt," the watercraft exclusion in the Travelers policy is not altogether free of doubt. "There is some ambiguity. There is a need for construction. At this late date, it is an affectation to cite cases as to what occurs in that situation with an insurance policy." 412 F.2d at 1037.

For the foregoing reasons, the Court concludes that Yo-Ro was not performing maintenance as contemplated by Exclusion (d) of the Travelers policy, and thus, Exclusion (d) does not relieve Travelers from coverage under its policy.

Travelers also denies coverage because of Exclusion (h) in the policy which states:

> This insurance does not apply:
>
> * * * * * *
>
> (h) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured; but this exclusion does not apply to liability assumed by the insured under an incidental contract;

It is conceded by the parties that Parfait was an employee of Yo-Ro, that his injury was sustained while in the course of his employment, and that the contract between Yo-Ro and Jahncke was not an "incidental contract," as defined in the policy. Yo-Ro, however, argues that any liability that it has to Jahncke is contractual, and that Exclusion (h) operates only when an employee of Yo-Ro is suing Yo-Ro directly. Moreover, Yo-Ro urges that certain language in Exclusion (a) in the policy is intended to retain coverage for any liability Yo-Ro has to Jahncke that arises out

of a breach of Yo-Ro's warranty of workmanlike performance which was owed to Jahncke. Exclusion (a) states that:

> This insurance does not apply:
>
> (a) to liability assumed by the insured under any contract or agreement except on incidental contract; but with respect to bodily injury or property damage occurring while work performed by the named insured is in progress, this exclusion does not apply to a warranty that such work will be done in a workmanlike manner.

Travelers, admitting that Exclusion (a) provides coverage for liability of Yo-Ro where Yo-Ro has breached its warranty of workmanlike performance resulting in a suit for indemnification under Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), as has been brought against Yo-Ro by Jahncke in this case, argues that the coverage for damages arising out of bodily injury retained in Exclusion (a) is restricted by Exclusion (h) to bodily injury to persons other than employees of Yo-Ro.

In support of its contention Yo-Ro cites Indemnity Insurance Company of North America v. California Stevedore & Ballast Company, et al, 307 F.2d 513 (9th Cir. 1962) wherein the Ninth Circuit considered the insurer's contention that its policy did not provide coverage where an employee of a stevedore sued a shipowner and the shipowner subsequently sought indemnification from the stevedore. The policy there in question contained an Exclusion (c) which stated:

Exclusion (c)

> This policy does not apply under coverage A, except with respect to liability assumed under written contract, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment of the insured, other than a domestic employee for whose injury benefits are not payable or required to be provided under any workmen's compensation law; or to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law; *** (emphasis added)

The court there found there was coverage notwithstanding such exclusion. First, it held that Exclusion (c) was generally inapplicable since it related to workmen's compensation or employer's liability, or both, neither of which was dealt with by the shipowner's case at bar. With regard to the issue pertinent to this case, the court simply stated, "We do not read Exclusion (c) as excluding anything having to do with appellees' [the stevedores'] contractual liability." 307 F. 2d at 516. The court then concluded that even if Exclusion (c) were generally applicable, the insurance coverage still would exist since, as the court determined, the stevedores' liability to the shipowners had been assumed under written contracts.[1]

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[1] Exclusion (h) of the Travelers policy with Yo-Ro in the instant case states that the policy applies to "liability assumed by the insured under an incidental contract,"

(continued on next page)

In the recent case of Larson Construction Co. v. Oregon Automobile Insurance Co., 450 F.2d 1193 (9th Cir. 1971), the Ninth Circuit considered in some detail the applicability of an exclusion from bodily injury coverage of bodily injury to an employee in the context of a comprehensive general liability policy, and amplified on its rationale of Indemnity Insurance, supra. The Larson case involved a situation where a barge loader's employee, injured while assisting in the loading of a barge, sued the barge owner, who claimed indemnification from the employer. Under its comprehensive general liability policy the employer's insurer was obligated "[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of *** BODILY INJURY," 450 F.2d at 1194. The policy in Exclusion (c), however, excluded coverage for "(c) *** bodily injury of an employee of an insured arising out of and in the course of *** (2) *** employment by an insured ***", 450 F.2d at 1194. The insurer denied liability on the basis of this exclusion. The court, however, stated:

> We turn to exclusion (c). The word in the insuring clause, "*** all sums which insured shall become legally obligated to pay as damages because

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1 (Cont.)
whereas the exclusion in Indemnity Insurance, supra, refers to "liability assumed under a written contract." The parties are in agreement that the contract of repair between Yo-Ro and Jahncke was not an "incidental contract" as defined by the policy.

of *** BODILY INJURY ***", standing alone, and without reference to the exclusions, is broad enough to cover first, the liability to an employee because of injuries suffered by him and second, the liability to a third person which has its origin in bodily injuries suffered by the employee. The problem here arises because the exclusion does not refer to "*** all sums which the insured shall become legally liable to pay as damages because of *** BODILY INJURY LIABILITY," but simply makes the coverage inapplicable to "*** bodily injury to any employee. ***" As we see it, the language of the exclusion is somewhat narrower than the language of the insuring clause and while the meaning is not clear, the exclusion could be interpreted to refer to no more than the damages suffered by the employee himself. Because of workman's compensation and similar laws, the employee presents a special kind of risk ordinarily insured by a special policy devoted exclusively to that risk or in some cases by deposits ordered by the officers administering the workman's compensation or similar law. A person examining exclusion (c) might reasonably believe that it was intended to exclude only that special employee hazard normally covered by that special policy. In view of the special treatment of the employee hazard, the differences between the words used in the insuring and the exclusion clauses and the fact that the risk here was a known risk, we hold that the exclusion (c) was not spelled out in sufficient certainty

> to eliminate the coverage in this case.
>
> The result which we reach is in accord with, although not compelled by, the decision in Indemnity Ins. Co. v. California Stevedore & Ballast Co., 307 F.2d 513 (9th Cir. 1962). In that case the Court relied upon the existence of a contract between the stevedore and shipowner and a clause in the policy assuming liability under written contracts. There is no contract here. Notwithstanding, we hold that if the liability of the stevedore to the shipowner is not to be insured in a comprehensive liability policy then that risk should be excluded in unmistakable terms no matter what words may be used to rationalize the imposition of the stevedore's liability. 450 F.2d at 1195-96 (Emphasis supplied).

There is some difference in the Travelers policy before this Court and the policy in the Larsen case which might arguably be used to distinguish Larsen. The policy in Larsen, supra, was a Comprehensive General Liability Policy whereas the instant Travelers policy is entitled Manufacturers' and Contractors' Liability Insurance. The wording of the general obligation of the insurer and Exclusion (h) in the instant policy are somewhat different from the wording employed in the policy in Larsen, supra.

The opinion in Larsen, supra, did not reproduce the policy in question in its entirety; therefore, it cannot be determined whether the policy in the Larsen case may have

had an exclusion similar to Exclusion (a) in the instant policy. Nevertheless, the presence of Exclusion (a) in Yo-Ro's insurance policy with Travelers reinforces the position that the Travelers policy provides coverage for Yo-Ro's liability to Jahncke.

It might be argued that a finding that the language of Exclusion (a) retaining coverage for liability arising out of breaches of warranty of workmanlike performance does provide coverate for Yo-Ro's liability would render Exclusion (h) in part meaningless. This Court is mindful that in considering an insurance policy it should interpret the policy so that all provisions of the policy are given a reasonable meaning and no portion is left inexplicable or useless. Jameson v. Mutual Life Insurance Company of New York, 415 F.2d 1017, 1020 (5th Cir. 1969). The Court is equally mindful, however, that where there is ambiguity in a policy of insurance, such ambiguity must be construed in favor of the insured. Grigsby, supra, at 1037.

The conclusion, therefore, is inescapable that the Travelers policy does provide coverage for Yo-Ro's liability to Jahncke which resulted from Yo-Ro's breach of its warranty of workmanlike performance. Such a conclusion does not render Exclusion (h) meaningless, rather, Exclusion (h) would operage to deny coverage to Yo-Ro for any liability it might have toward insured employees who are not covered by compensation or similar statute.[1]

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[1] The Ninth Circuit in Larsen, supra, indicated that it was reasonable to assume that the exclusion before that court was intended to deny coverage for any liability the employer might

(continued on next page)

The exception in Exclusion (a) is clearly intended to provide coverage where Yo-Ro's liability arises as a result of a breach of its warranty of workmanlike performance. If Travelers intended to limit this coverage to bodily injury to persons other than employees of Yo-Ro, then it did not do so with sufficient clarity.

Home Indemnity Company Policy

Home's policy is a workmen's compensation and employer's liability policy. The policy is intended to provide Yo-Ro with coverage when there is a compensation claim or when an employee has a claim that is not covered by a compensation Act. The policy covered claims under the Louisiana Workmen's Compensation and the Longshoremen and Harbor Workers Act. There was also $25,000 coverage under Employer's Liability.

The only maritime liability covered by the policy is under the Longshoremen and Harbor Workers Act; all other maritime liability is excluded by the following endorsement:

> It is agreed that the policy does not apply to injury, including death resulting therefrom, sustained by a master or a member of the crew of any vessel or by any person in the course of an employment subject to

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1 (Cont.)
have under a workmen's compensation statute. The instant Travelers policy, however, contains a specific exclusion [Exclusion (g)] dealing with liability under workmen's compensation statutes.

the United States Longshoremen's and Harbor Workers' Compensation Act.

Wilson Parfait was injured while repairing a vessel on navigable waters, and is, thus, subject to the provisions of the Longshoremen and Harbor Workers Act. Calbeck v. Travelers Ins. Co., 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962). The policy provides coverage for a claim under the Longshoremen and Harbor Workers Act, but that is the limit of the policy's coverage for maritime injuries.

In Brickley v. Offshore Shipyard, Inc., 270 F.Supp. 985 (E.D. La. 1967), the plaintiff was seeking recovery as a seaman or in the alternative, as a longshoreman. The defendant's insurance policy contained an exclusion which stated:

> It is agreed that the policy does not apply to injury; including death resulting therefrom, sustained by:
> (1) a master or a member of the crew of any vessel . . . .
> 270 F.Supp. 987.

The Court stated:

> If the plaintiff here were a seaman, as he alleges in his complaint, we would feel bound to grant the motion for summary judgment for lack of coverage, since the very definition of seaman is "a member of the crew of any vessel." 270 F. Supp. at 987.

In Home's policy the exclusion of maritime liability has been extended to injuries sustained by persons subject to the Longshoremen and Harbor Workers Act, and therefore,

the Court must conclude that the policy does not provide coverage for Yo-Ro's liability to Jahncke arising out of the accident of the plaintiff Parfait.

Reasonableness of the Settlement

The Court concludes that the settlement between Wilson Parfait and Jahncke was reasonable. Yo-Ro argues that it should not be required to accept the settlement because it did not participate in the settlement negotiations between Parfait and Jahncke. There is no merit to Yo-Ro's contention inasmuch as it was apprised of the progress of settlement negotiations (Jahncke's Exhibit 4) and felt that the negotiations were favorable to Yo-Ro (Jahncke's Exhibit 3). Parfait was suing Jahncke, and it was Jahncke's responsibility to seek settlement. A shipowner may settle the main demand with the injured longshoreman or harbor Worker and proceed against the employer where the stevedore's acts caused the accident. Paliage v. Luckenbach Steamship Company, 301 F.2d 403 (2nd Cir. 1962), and American Export Lines v. Norfolk Shipbuilding & Drydock Corporation, 336 F.2d 525 (4th Cir. 1964). In the cited cases there is no requirement that a shipowner include the employer in the settlement negotiations.

Travelers asserts that a finding by the Court of the cause of the accident is determinative of the reasonableness of the settlement. Travelers contends that if Parfait's injury resulted solely from oil on his shoes, then the settlement was unreasonable because Parfait was solely responsible for his injury; however, if the spillage of oil by Jahncke employees cleaning engine parts on the upper deck caused Parfait's accident, then the

settlement was reasonable because Jahncke was responsible for the accident.

The test of the reasonableness of the settlement is the potential liability of the shipowner. In California Stevedore & Ballast Co. v. Pan-Atlantic Steamship Corporation, 291 F.2d 252 (9th Cir. 1961), the Ninth Circuit refused to accept the stevedore's argument that the liability of the shipowner must be proved to have been an actual one. Rather, the court stated:

> [T]he indemnitee need show only a potential liability; the indemnitee need not resist settlement to the point of a jury verdict, the amount of which might greatly exceed a reasonable settlement. 291 F.2d at 254.

See also, Damanti v. A/S Inger, 314 F.2d 395, 397 (2nd Cir. 1963). Jahncke has shown that it faced a serious potential liability. Under either theory as to the source of the oil which caused Parfait to slip, Jahncke would face a serious potential liability from a claim of unseaworthiness by Parfait.

The only question remaining is the reasonableness of the amount of the settlement. The suit was for $160,000 with evidence that Parfait had suffered a permanent disability as to heavy work, lost wages of $30,000, anticipated lost wages of $130,000, and two operations for the removal of ruptured disc material. Even assuming substantial contributory negligence on the part of Parfait, the settlement in the amount of $74,635.84 was reasonable.

Accordingly, IT IS ORDERED that there be

judgment in favor of Jahncke Service, Inc. in the amount of $74,635.84 against Yo-Ro Diesel Service, Inc. on the third party demand for indemnification.

IT IS FURTHER ORDERED that there be judgment in favor of Yo-Ro Diesel Service, Inc. and against Travelers Indemnity Company on the third party demand seeking to establish coverage for Yo-Ro Diesel Service, Inc.'s liability to Jahncke Service, Inc.

IT IS FURTHER ORDERED that there be judgment in favor of Home Indemnity Company and against Yo-Ro Diesel Service, Inc. on the third party demand seeking to establish coverage for Yo-Ro Diesel Service, Inc.'s liability to Jahncke Service, Inc.

Thus done and signed at New Orleans, Louisiana, this 21st day of July, 1972.

s/Jack M. Gordon
United States District Judge

UNITED STATES DISTRICT COURT	: CIVIL ACTION
EASTERN DISTRICT OF LOUISIANA	: NO. 69-225
	: SECTION I
	: Filed 10-12-72

WILSON J. PARFAIT

versus

JAHNCKE SERVICE, INC.

AMENDED JUDGMENT

This action having come on for trial before the Court, on a former day, Honorable Jack M. Gordon, District Judge, presiding, and the issues having been duly tried, and Findings of Fact and Conclusions of Law having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Jahncke Service, Inc. and against third-party defendant, Robert E. Ruppel d/b/a Yo-Ro Diesel Service and Yo-Ro Diesel Service, Inc., on Jahncke's third-party demand for indemnification, in the amount of Seventy Four Thousand Six Hundred Thirty Five and 84/100 ($74,635.84) Dollars, in addition to its expenses and costs of defense, including a reasonable attorney's fee, with legal interest thereon at the rate of seven percent (7%) per annum as provided by law, from the date

of the filing of the original Judgment in this action;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment over, in the same amount and for the same items of recovery, in favor of Robert E. Ruppel d/b/a Yo-Ro Diesel Service, and against fourth-party defendant, The Travelers Indemnity Company on Yo-Ro's fourth-party demand for insurance coverage under Travelers' policy, in addition to its expenses and costs of defense, including a reasonable attorney's fee, with legal interest thereon at the rate of seven percent (7%) per annum as provided by law, from the date of the filing of the original Judgment in this action;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Home Indemnity Company and against Robert E. Ruppel d/b/a Yo-Ro Diesel Service, and Yo-Ro Diesel Service, Inc., on Yo-Ro's fourth-party demand seeking to establish insurance coverage under Home's policy;

IT IS FURTHER ORDERED that if the parties do not agree, within sixty (60)days of the date of filing of the original Judgment, on the amounts of expenses and costs of defense, including reasonable attorneys' fees, as awarded herein, any party may, upon written motion, apply to the Court for a hearing to determine those amounts.

New Orleans, Louisiana, this 12 day of September, 1972.

s/Jack M. Gordon
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

s/Christopher Tompkins
CHRISTOPHER TOMPKINS
and
LEONARD N. BOUZON
of
DEUTSCH, KERRIGAN & STILES
1700 Hibernia Bank Building
New Orleans, Louisiana 70112
Telephone: 524-1221
Attorneys for Jahncke Service, Inc.

NO OBJECTION AND APPROVED AS TO FORM:

s/Walter F. Gemeinhardt
WALTER F. GEMEINHARDT
1328 National Bank of Commerce Building
New Orleans, Louisiana 70112
Attorneys for Robert E. Ruppel d/b/a
Yo-Ro Diesel Service and
Yo-Ro Diesel Service, Inc.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3316

WILSON J. PARFAIT,

Plaintiff,

versus

JAHNCKE SERVICE, INC.,

Defendant-Third Party
Plaintiff-Appellee,

YO-RO DIESEL SERVICE, INC.,

Third Party Defendant-
Fourth Party Plaintiff-
Appellee-Appellant,

HOME INDEMNITY COMPANY,

Third Party Defendant-Appellee,

THE TRAVELERS INDEMNITY COMPANY,

Fourth Party Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

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(August 31, 1973)

APPENDIX B

2 W. J. PARFAIT v. JAHNCKE SERVICE, INC.

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

THORNBERRY, Circuit Judge: In this multiparty admiralty case we must determine whether the district court properly awarded a shipowner indemnity under the *Ryan* doctrine for amounts it paid in settlement of a claim against it and whether the district court correctly interpreted two insurance policies.

On October 1, 1967, Wilson Parfait, an employee of Yo-Ro Diesel Service, Inc., was injured while he was aboard a diesel dredge owned and operated by Jahncke Service, Inc. to repair a broken cylinder block of one of the vessel's engines. Parfait sued Jahncke to recover for his injuries, alleging negligence and unseaworthiness. Jahncke filed a third-party complaint against Yo-Ro for indemnity under the *Ryan*[1] doctrine. Jahncke and Yo-Ro both filed fourth-party actions against Yo-Ro's two insurers, Travelers Indemnity Company and Home Indemnity Company. Jahncke settled the original suit brought by Parfait, and the third- and fourth-party suits were tried to the Court. The district court awarded Jahncke indemnity from Yo-Ro, and held Yo-Ro's loss to be covered by the Travelers policy, but not by the Home policy. Travelers and Yo-Ro appeal, testing the strength of all links by which they are connected to the liability chain. Additionally, Yo-Ro seeks to forge a new protective link, arguing that the Home insurance policy, as well as the Travel-

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[1]Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation, 1956, 350 U.S. 122, 76 S.Ct. 232.

ers policy, should be construed to cover any loss which Yo-Ro may eventually suffer as a result of Parfait's injury. We affirm the district court's ruling that Jahncke is entitled to indemnity from Yo-Ro but reverse as to coverage under each insurance policy.

The district court summarized the facts relating to Parfait's injuries as follows:

> Upon discovering that the main pump engine aboard The Manchac was broken, Jahncke contracted with Yo-Ro to weld the broken part. Parfait, the working foreman for Yo-Ro, came aboard the vessel to inspect the broken pump engine and determine what equipment should be used to make the repair. After completing his inspection, Parfait left the vessel to obtain the tools and equipment needed for performance of the repair job. About two hours later Parfait returned with his son, Wilson J. Parfait, Jr., who was employed by Yo-Ro as an apprentice welder and was to assist his father in the welding job. While Parfait was gone, Jahncke's employees had dismantled part of the engine to enable Parfait to perform his repair work, and, in doing so, the Jahncke employees disconnected a fuel line from which fuel oil was allowed to drip and accumulate on the catwalk adjacent to the engine, creating a dangerous condition. The Jahncke employees were not aware that fuel oil had dripped and created a hazard. Parfait, while standing on the catwalk to work on the engine, noticed that fuel oil was dripping and that it had ac-

cumulated on the floor where he was working; however, he neither attempted to remove the oil nor did he request Jahncke's employees to clean it up.

After working for approximately two hours on the repair, Parfait reached a point where the weld had to cool before he could continue. He walked to the end of the catwalk and up a short ladder to the deck above and proceeded straight to a wash stand a short distance away. After washing his hands he returned, in the same direction from which he had come, and headed for the ladder leading down to the catwalk. As he neared the ladder he slipped and fell, either as a result of fuel oil on the soles of his shoes that had been picked up while he worked on the catwalk where fuel oil had accumulated, or as a result of fuel oil tracked on the steel deck by his shoes when he walked toward the wash stand.

Parfait v. Jahncke Service, Inc., E.D. La. 1972, 347 F.Supp. 485, 488-89. The fall caused serious injury to Parfait's neck and back.

As outlined above, Parfait sued Jahncke on theories of negligence and unseaworthiness, Jahncke impleaded Yo-Ro as the third-party defendant, and both Yo-Ro and Jahncke impleaded Yo-Ro's insurers as fourth-party defendants. In early January of 1972, counsel for Parfait offered to settle the $160,000 suit for $90,000. Upon receiving notice of the offer, counsel for Yo-Ro wrote Jahncke, Travelers, and Home indicating that

he would regard as favorable a settlement in any amount within the $100,000 limit of Yo-Ro's general liability insurance policy with Travelers and called upon Travelers and Home to effect such a settlement immediately.[2] In reply counsel for Jahncke offered Yo-

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[2]The January 14, 1972, letter from counsel for Yo-Ro to counsel for Jahncke, for Home, and for Travelers read:

> Reference is made to a letter offer by Mr. Samuel Gainsburgh, co-counsel for the plaintiff, Wilson Parfait, wherein he indicated he would settle the pending lawsuit for the sum of $90,000.00. Obviously, this figure would be within the policy limits. Further, it would be to the best interest and advantage of the assured to have this lawsuit settled for any sum beneath the maximum amount of the general liability policy in the amount of $100,000.00.
>
> As attorney for Yoro Diesel Service, Inc., I respectfully request that the insurers settle this lawsuit to avoid exposure by Yoro of amounts in excess of the policy limit and because of the various facts and circumstances which directly affect the economic interests of Yoro. Accordingly, it is submitted that it would be to the best interest of the assured to have this lawsuit settled and I call upon you to immediately effect a settlement of the pending lawsuit, with full reservation of the attorney's fees for Yoro, and I reiterate that in the event a settlement is not consummated immediately, there is a continuing duty on your behalf to defend this matter. I re-urge your obligations under the policy and request compliance therewith, and re-assert our claim for reasonable attorney's fees.

This letter could reasonably be read as a request to Jahncke to settle for any amount under $100,000. In a letter to Yo-Ro dated January 20, 1972, counsel for Yo-Ro "explained" that the request for settlement in the January 14 letter was directed only to the insurers, and not to Jahncke. Since we cannot ascertain with confidence from the record a clear intent on Yo-Ro's part to approve the Jahncke-Parfait settlement and since the district court made no finding on this issue, we accord Yo-Ro the benefit of the doubt and treat the January 14 letter as a request for settlement directed to the insurers only. *See* note 8, *infra*.

Ro the defense of the action in exchange for a hold-harmless agreement, and indicated he would attempt to settle the case along the lines indicated by Yo-Ro if Yo-Ro did not accept the offer to take over the defense.[3] In the absence of any further objection by Yo-Ro, Jahncke settled with Parfait for a total of $74,635.84 shortly before trial of Parfait's action was to begin. At trial of the third- and fourth-party claims Yo-Ro objected to the reasonableness of the settlement, and Travelers and Home denied coverage under their respective policies.

The district court found that the oil which had dripped on to the catwalk created an unseaworthy condition which was a proximate cause of the accident, and

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[3]The full text of the January 20, 1972, letter from counsel for Jahncke to counsel for Yo-Ro read:

> I have a copy of your letter of January 14, 1972, to counsel for your clients' insurers and I note that you consider that settlement in the amount of $90,000.00 would be desirable.
>
> As I told you over the telephone yesterday, I have been talking to Sam Gainsburgh in an attempt to work out a compromise agreement and if the opportunity presents itself in which we think that settlement can be made on an attractive basis, we will settle the principle [sic] claim and proceed against your client for indemnity.
>
> I invite you again to come in and defend Jahncke Service, Inc. in this matter and satisfy us that your client will hold it harmless and fully indemnify it for any adverse judgment in the premises. If I do not have your immediate acceptance of this offer, I will proceed with settlement along the above lines, if a reasonable opportunity presents itself to settle the case at a reasonable figure.

See note 8, *infra*.

that, even assuming substantial contributory negligence on the part of Parfait, the settlement was reasonable in amount. The court held further that Yo-Ro had breached its duty to Jahncke to perform its work in a workmanlike manner and that Jahncke was therefore entitled to indemnification from Yo-Ro for the sum it paid to satisfy its potential liability to Parfait. Finally, the district court construed the Travelers policy, but not the Home policy, as covering the indemnity expense incurred by Yo-Ro, so that the cost of the settlement ultimately fell on Travelers.

I. Indemnity

We treat first the question whether the district court properly awarded Jahncke indemnity from Yo-Ro. To establish its entitlement to indemnity for the amount paid in settlement of Parfait's claim, Jahncke was required to show first that an indemnitory-indemnitee relationship existed between Yo-Ro and itself. If there was such a relationship, Jahncke had the additional burden of satisfying the district court that it, Jahncke, had acted in accordance with equitable indemnity principles in making the settlement and had not spent its indemnitor's money too freely.

Below Jahncke relied on the breach of warranty theory set forth in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 1956, 350 U.S. 124, 76 S.Ct. 232 to establish an indemnitor-indemnitee relationship. Under the *Ryan* doctrine stevedores and other shore-based contractors who go aboard a vessel by the owner's arrangement or by his consent to perform

service for the ship's benefit impliedly warrant to the shipowner that they will accomplish their task in a workmanlike manner.[4] The essence of the contractor's warranty of workmanlike performance is to perform its work "properly and safely." *Id.* 350 U.S. at 133, 76 S.Ct. at 237. *See also Whisenant v. Brewster-Bartle Offshore Company*, 5th Cir. 1971, 446 F.2d 394, 399. The maritime contractor's warranty, just as a manufacturer's warranty against defective products, may be breached even when the contractor has not been negligent. *Italia Societa v. Oregon Stevedoring Company*, 1964, 376 U.S. 315, 84 S.Ct. 748. If the contractor breaches its warranty, and the breach proximately causes liability on the part of the shipowner, then the shipowner is entitled to indemnity unless its own conduct is "sufficient to preclude indemnity." *Weyerhaeuser Steamship Company v. Nacirema Operating Company*, 1958, 355 U.S. 563, 567, 78 S.Ct. 438, 441. To determine whether the shipowner has engaged in conduct sufficient to preclude indemnity, the conduct in question must be weighed against the contractor's breach of warranty under contract principles. *Waterman Steamship Corporation v. David*, 5th Cir. 1966, 353 F.2d 660. If the shipowner did not "prevent or seriously handicap the stevedore in his ability to do a workmanlike job," then its conduct will not preclude indemnity. *Albanese v. N. V. Nederl. Amerik Stoomv.*, 2nd Cir. 1965, 346 F.2d 481. Negligence on the ship-

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[4]We note that the *Ryan* doctrine was abrogated by the 1972 amendments to the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. § 901, et seq. *See* 33 U.S.C.A. § 905(b). Of course, the amendments do not affect this action, which arose and was tried long before they became effective.

owner's part is not necessarily fatal to its claim for indemnity. *Weyerhaeuser Steamship Company v. Nacirema Operating Company, supra; see Italia Societa v. Oregon Stevedoring Company, supra,* 376 U.S. at 320, 84 S.Ct. at 751. In summary, "[t]he determination of whether contractual indemnity should be allowed involves a weighing process evaluating the conduct of both parties to determine (1) whether the WWLP [warranty of workmanlike performance] was breached; (2) whether that breach proximately caused the injury; and (3) whether the shipowner's conduct prevented the workmanlike performance." *Garner v. Cities Service Tankers Corp.*, 5th Cir. 1972, 456 F.2d 476, 481.

This Court has previously recognized the "equitable spirit behind the *Ryan* doctrine." *Whisenant v. Brewster-Bartle Offshore Company, supra,* at 400. Its purpose is generally to place "the burden ultimately on the company whose default caused the injury." *Italia Societa v. Oregon Stevedoring Company, supra,* 376 U.S. at 324, 84 S.Ct. at 754. The *Ryan* doctrine is not, however, a precision instrument for allocating the burden according to the relative amounts of fault, but a rough all-or-nothing device. Even where the shipowner and the contractor are both at fault, under the *Ryan* warranty doctrine indemnity will be allowed wholly or not at all, as the trier of fact may determine by weighing the conduct of the two parties as described above. See *Garner v. Cities Service Tankers Corp., supra* at 480 n. 6; G. Gilmore & C. Black, *The Law of Admiralty,* § 6-57 at 373 (1957).

In attacking the district court's conclusion that an indemnitor-indemnitee relationship existed between Yo-Ro and Jahncke under the Ryan doctrine, appellants make three arguments. First, with regard to the breach of warranty issue, eschewing any contention that fuel oil may not be an unseaworthy condition or that a maritime contractor's failure to stop work or eliminate the hazard may be a breach of the contractor's warranty of workmanlike performance,[3] they attack the district court's findings of underlying facts. Specifically, appellants argue that the record shows that no oil accumulated on the catwalk where Parfait was working, so that failure to eliminate the non-existent hazard could not have been a breach of Yo-Ro's warranty of workmanlike performance. They urge that the oil upon which Parfait slipped came from a barrel on the upper deck in which Jahncke employees were cleaning engine parts. This attack must founder on the "clearly erroneous" rule. Fed. R. Civ. P. 52(a); *MacAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6. It is true that Parfait's testimony, which was the principal evidentiary source of the district court's findings, was impeached at trial by the introduction of prior inconsistent statements given at depositions and that it was inconsistent in some particulars with the testimony of other witnesses. We note, however, that at least two other witnesses' testimony tended to corroborate that the fuel oil on the upper deck was clear of Parfait's path at the time of the fall. The district court carefully considered this factual question and

[3]Such an argument is foreclosed, as the district court observed, by Burrage v. Flota Mercante Grancolombiana, 5th Cir. 1970, 431 F.2d 1229.

specifically rejected appellants' version of the facts in favor of plaintiff's version. On the record before us we cannot say this finding was clearly erroneous. Secondly, with regard to the causation issue, appellants make a related factual argument that even if Yo-Ro breached its *Ryan* warranty by failing to clean up oil on the catwalk, this breach was not the cause of Parfait's fall, since he slipped on oil from the upper deck. Again, we cannot hold the district court's contrary finding clearly erroneous.

Thirdly, appellants advance a fundamentally misconceived argument that Jahncke can have no right of indemnity against Yo-Ro because Jahncke was actively negligent and Yo-Ro was at most passively or secondarily negligent. "Indemnity may arise either in contract or in tort." *General Electric Company v. Cuban American Nickel Company*, 5th Cir. 1968, 398 F.2d 89, 90. The two types of indemnity rights rest on separate and distinct theoretical bases and require proof and evaluation of different elements. *See, e.g., Halliburton Company v. Norton Drilling Company*, 5th Cir. 1962, 302 F.2d 431, reh. denied 1963, 313 F.2d 380, cert. denied 374 U.S. 829, 83 S.Ct. 1870; *American President Lines, Ltd. v. Marine Terminals Corporation*, 9th Cir. 1956, 234 F.2d 753, cert. denied 352 U.S. 926, 77 S.Ct. 222. As between two joint tort-feasors, the actively negligent party may recover indemnity from the passively negligent party. This type of indemnity was explored in depth in *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Company*, 5th Cir. 1969, 410 F.2d 178. *See also Magnum Marine v. Kenosha Auto Transport Corporation*, 5th Cir. 1973, ____ F.2d ____ [No. 72-3635,

July 10, 1973]. Although principles of equity underlie both this tort indemnity doctrine and the *Ryan* doctrine, indemnity under the latter does not rest on the tort concepts implicit in the former, but on a contractual warranty theory. *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation, supra* 350 U.S. at 133, 76 S.Ct. at 237. If the *Ryan* case itself left any doubt as to the distinctly contractual nature of the warranty doctrine it established, that doubt was removed in the final paragraph of *Weyerhaeuser Steamship Company v. Nacirema Operating Company, supra*, 355 U.S. at 569, 78 S.Ct. at 442, where the Court pointed out "that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." Thus, appellants' active-or-passive negligence argument is made in the wrong case; it does not touch on the pivotal issues of the *Ryan* doctrine, upon which the district court relied in determining that an indemnitor-indemnitee relationship existed in this case.

Construing appellants' active-negligence argument as a challenge to the district court's determination that the shipowner's conduct was not sufficient to preclude indemnity, we find it without merit. We agree with the district court that "any fault by Jahncke and unseaworthiness created thereby, would not have prevented Yo-Ro from performing its operations in a workmanlike manner." 347 F.Supp. at 490.

Being unpersuaded by appellants' assaults on the district court's determination that an indemnitor-indemnitee relationship existed between Yo-Ro and

Jahncke, we proceed to the second major part of appellants' attack on the district court's order of indemnity. The district court held that in order to exercise its right of indemnity against Yo-Ro for the amount of the settlement, Jahncke was required to show only potential liability, not actual liability to Parfait, and that the amount of the settlement was reasonable. And it found that Jahncke made the required showings. Appellants argue that Jahncke was required to show actual liability to Parfait and that the amount of the settlement was not reasonable.

The actual-versus-potential liability problem is unique to cases in which the original defendant (indemnitee) has settled with the original plaintiff without giving the third-party defendant (indemnitor) an opportunity to approve the amount of the settlement or to conduct the defense, and in which traditional indemnity principles are not modified by express contract between the parties. To be distinguished are "cases in which (1) the original defendant's claim for indemnification was founded on a judgment, or (2) the indemnitor was tendered the defense and refused it, or (3) the indemnitee's claim against the indemnitor was founded upon a written contract." *Whisenant v. Brewster-Bartle Offshore Company*, 5th Cir. 1971, 446 F.2d 394, 401-02; *see Tankrederiet Gefion A/S v. Hyman-Michaels Company*, 6th Cir. 1969, 406 F.2d 1039, 1042. In settlement cases such as the instant one, the indemnitee has the special problem of showing that his disposition of the indemnitor's funds has not contravened equitable indemnity principles.

Such principles require at a minimum that the indemnitee demonstrate his potential liability to the original plaintiff. *Smith v. Brown & Root Marine Operators, Inc.*, W.D. La. 1965, 243 F.Supp. 130, *aff'd per curiam sub nom. Underwater Services, Inc. v. Brown & Root Marine Operators, Inc.*, 5th Cir. 1967, 376 F.2d 852.[6] This Court has recognized that under some circumstances, when the original claim has been settled, a showing of actual liability may be required to support the indemnity claim. *Whisenant v. Brewster-Bartle Offshore Company, supra* at 401-03. We have approved the view of the Fourth Circuit expressed in *Jennings v. United States*, 4th Cir. 1967, 374 F.2d 983, 986 that:

> The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and an opportunity to defend are the indispensable due process satisfying elements.

See *Whisenant v. Brewster-Bartle Offshore Company, supra* at 403. This Circuit has not, however, unreservedly adopted the "general rule" of the Sixth Circuit "that an indemnitee must show actual liability to recover against an indemnitor." *Tankrederiet Gefion A/S v. Hyman-Michaels Company*, 6th Cir. 1969, 406 F.2d 1039, 1042.

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[6] *See also* Jennings v. United States, 4th Cir. 1967, 374 F.2d 983; American Export Lines v. Norfolk Shipping & Drydock Corporation, 4th Cir. 1964, 336 F.2d 525; Damanti v. A/S Inger, 2d Cir. 1963, 314 F.2d 395, 397, cert. denied sub nom. Daniels & Kennedy, Inc. v. A/S Inger, 375 U.S. 834, 84 S.Ct. 46; Paliaga v. Luckenbach Steamship Company, 2d Cir. 1962, 301 F.2d 403; California Stevedore & Ballast Company v. Pan-Atlantic Steamship Corporation, 9th Cir. 1961, 291 F.2d 252.

In this case we do not find any circumstances present which, in fairness to the indemnitor, call for proof of actual liability.[7] A practical device by which an indemnitee can protect himself against the awkward possibility of having to prove the original plaintiff's case against himself, the original defendant, is to offer the indemnitor before any settlement is concluded the choice of (1) approving the settlement or (2) taking over the defense of the case and agreeing to hold the indemnitee harmless in any event for damages which may be assessed against him in excess of the amount of the proposed settlement. See *Tankrederiet Gefion A/S v. Hyman-Michaels Company, supra* at 1043-44. If the indemnitor approves the settlement or defends unsuccessfully against the original claim, he cannot later question the indemnitee's liability to the original claimant. If the indemnitor declines to take either course, then the indemnitee will only be required to show potential liability to the original plaintiff in order to support his claim over against the indemnitor. Al-

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[7]The district court determined only that Jahncke demonstrated its potential liability to Parfait, but the court's finding that the accumulated oil on the catwalk beside the engine constituted an unseaworthy condition which was a proximate cause of the accident closely approaches a determination that Jahncke's actual liability was established. Because the district court did not rule in the first instant on Parfait's status as a *Sieracki* seaman or on the extent of his contributory negligence, if any, however, we do not treat the district court's finding of unseaworthiness which proximately caused the accident as a conclusive finding of factual liability. *See* Jackson v. Lykes Brothers Steamship Company, 1967, 386 U.S. 731, 734, 87 S.Ct. 1419, 1421 n.4; Seas Shipping Company v. Sieracki, 1946, 328 U.S. 85, 94, 66 S.Ct. 872, 877 n.11; Whisenant v. Brewster-Bartle Offshore Company, 5th Cir. 1971, 446 F.2d 394, 403 n.31.

though the record in this case does not conclusively show that Jahncke formally made to Yo-Ro the type of pre-settlement offer[8] described in *Tankrederiet Gefion A/S v. Hyman-Michaels Company, supra,* it does show that Yo-Ro was afforded substantially the same protection as if the *Tankrederiet Gefion* procedure had been followed. Yo-Ro was continuously informed of the settlement negotiations in progress and was offered and declined defense of the original action. The only variation from the *Tankrederiet Gefion* procedure was the apparent failure of Jahncke to tender the final settlement offer to Yo-Ro for approval. In view of Yo-Ro's awareness of the progress of the negotiations and its failure to object to settlement on the terms contemplated, we do not view this omission as serious in the circumstances of this case. Yo-Ro had a clear opportunity to challenge the Jahncke-Parfait liability to protect its own interest as an indemnitor, yet it declined to do so. Under the circumstances, we conclude that only a showing of potential liability was necessary. The finding of potential liability is strongly supported by the record.

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[8]The letter quoted in note 3, *supra*, appears to be such a pre-settlement offer, but it may not have arrived before the settlement was concluded. The letter is dated January 20, 1972, a maximum of three days before the settlement, which was concluded at an undisclosed time before trial began on Monday, January 24, 1972.

But for the January 20, 1972 letter from Yo-Ro to Jahncke (whose arrival time in relation to the time of the settlement is also unknown to us) which "explained" the earlier January 14 letter from Yo-Ro to Jahncke, *see* note 2, *supra*, we would construe the January 14 letter as an effective approval of any settlement under $100,000 that Jahncke might make with Parfait, estopping Yo-Ro from questioning the Jahncke-Parfait liability and rendering a formal *Tankrederiet Gefion* offer unnecessary.

The *Whisenant* case, in which a showing of actual liability was required, is distinguishable. There the original negligence theory on which the original plaintiff had proceeded appeared questionable as a basis for liability, and the indemnitee had attempted to justify the settlement by amending its pleadings to introduce a new unseaworthiness theory. Further, the indemnitor in that case had no real opportunity to contest the original claim, and the record indicated that, given the chance, he would have chosen to do so. None of these circumstances, nor any others suggesting unfairness to the indemnitor, are present in the instant case.

In addition to potential liability, Jahncke had the burden of showing that the settlement was reasonable in amount. Appellants urge that the amount of the settlement was excessive because if the claim had been tried, contributory negligence of the plaintiff would have diminished the amount of his recovery by a fraction approaching one hundred percent. We cannot say, however, that the contrary finding of the district court was clearly erroneous.

Thus, we conclude that the district court properly held an indemnitor-indemnitee relationship existed between Yo-Ro and Jahncke by virtue of the *Ryan* doctrine and that Jahncke, having shown potential liability and the reasonableness of the amount of its settlement with Parfait, was entitled to indemnification from Yo-Ro.

II. Coverage Under the Policy of Travelers Indemnity Company

It was stipulated at trial that Yo-Ro offered its insurers an opportunity to defend in accordance with its contractual obligations and that each insurer denied coverage. Whether the insurance companies must pay Yo-Ro's damages depends wholly on whether the loss is covered under their respective policies.

The pertinent insuring language in the Travelers $100,000 "Commercial Automobile — General Liability Policy" reads:

> The company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of
>
> Coverage A. *Bodily injury.*
>
> Coverage B. *Property damage.*
>
> to which this insurance applies .... [emphasis in original.]

As defined in the policy, "bodily injury" means "bodily injury, sickness or disease sustained by any person," and "property damage" means "injury to or destruction of tangible property." Travelers contends that two exclusionary paragraphs preclude coverage for Yo-Ro's loss. The first is exclusion (d), also called the "watercraft exclusion." We do not deal with this

exclusion, since we agree with Travelers that the second one, exclusion (h), makes plain that the policy does not cover the type of loss involved in this case.

The exclusionary provision reads:

> This insurance does not apply to:
>
> (h) *bodily injury* to any employee of the *insured* arising out of and in the course of the employment by the insured; but this exclusion does not apply to liability assumed by the *insured* under an *incidental contract*. [emphasis in original.]

The parties agree that Parfait was Yo-Ro's employee, that he was injured in the course of his employment, and that no "incidental contract," as that term is defined in the policy, existed between Yo-Ro and Jahncke. Thus, the exclusion would appear to defeat coverage in this case. Yo-Ro's argument in favor of coverage is that the exclusion applies only to liability resulting from an action by the injured employee directly against the employer, and not to an obligation to indemnify a third party which has been found primarily liable to compensate an injured employee of the insured.

We agree with Yo-Ro that the insuring language in the policy, which speaks broadly of "all sums" which the insured shall become obligated to pay as damages "because of" bodily injury, is broad enough to cover both (1) liability directly to an injury victim and (2)

liability to indemnify a third party which is based ultimately on bodily injury, but we cannot agree that exclusion (h) applies only to the former type of liability. The insuring language covers only liability — whether direct or indirect via indemnity under the *Ryan* doctrine — for bodily injury "to which this insurance applies." Exclusion (h) provides expressly that the insurance does not apply to injury to the insured's employees in the course of their employment. The employee status of the injury victim is made the key to the exclusion, not the procedural route by which the liability comes to rest on the insured. Bodily injury coverage of the policy extends only to non-employees. We do not find such an exclusion anomalous in Travelers' "Commercial Automobile — General Liability Policy," for employee injuries have long been treated as a special kind of risk and covered under special policies.

Exclusion (a) is not inconsistent with exclusion (h) and does not change our conclusion. Under exclusion (a) the insurance does not apply:

> (a) to liability assumed by the *insured* under any contract or agreement except an *incidental contract;* but with respect to *bodily injury* or *property damage* occurring while work performed by the *named insured* is in progress, this exclusion does not apply to a warranty that such work will be done in a workmanlike manner. [emphasis in original.]

In exempting from its sweep warranty liability under the *Ryan* doctrine, exclusion (a) is consistent with our broad reading of the insuring language. Exclusion (a) is limited by exclusion (h), but the two are not inconsistent, since liability arising from injury to a non-employee might be imposed under the *Ryan* doctrine.*

Indemnity Insurance Company v. California Stevedore & Ballast Company, 9th Cir. 1962, 307 F.2d 513, upon which Yo-Ro relies, is not apposite, since the policy language in that case was significantly different from the language in question in this case. The applicability of *Larson Construction Company v. Oregon Automobile Insurance Company*, 9th Cir. 1971, 450 F.2d 1195, is doubtful because only brief fragments of the insuring and exclusionary language are quoted in that opinion.

We are, of course, aware of the rule that ambiguities in an insurance policy must be construed against the insurer, but we can discover no ambiguities or incon-

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*After explaining the contractual nature of the *Ryan* warranty of workmanlike performance, under which the shipowner may recover from the stevedore the amount of damages the shipowner has paid on acount of injuries to the stevedore's employee, the Supreme Court explained:

> And a like liability for breach of contract accrues to a shipowner against a stevedoring contractor in any instance when the latter's improper storage of cargo causes an injury on shipboard to someone other than one of its employees. The coincidence that the loading contractor here happens to be the employer of the injured longshoreman makes no difference in principle.

Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation, 1956, 350 U.S. 124, 130-31, 76 S.Ct. 232, 236.

sistencies in the Travelers policy as applied to the facts of this case. The plain language of the policy shows that it does not cover liability originating in injuries to the insured's employees. Accordingly, we must reverse that portion of the district court's judgment holding that the Travelers policy covered Yo-Ro's obligation to indemnify Jahncke.

III. Coverage Under the Policy of Home Indemnity Company

In its "Standard Workmen's Compensation and Employers' Liability Policy" Home agreed:

> 1. Coverage A — Workmen's Compensation: To pay promptly when due all compensation and other benefits required of the insured by the workmen's compensation law.
>
> 2. Coverage B — Employers' Liability: To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom, sustained ... by any employee of the insured arising out of and in the course of his employment by the insured ....

The policy limit of liability is $25,000. As was true of the Travelers policy, the insuring language in the Home policy is broad enough to cover both direct liability to the injury victim and indirect liability under

the *Ryan* doctrine on account of bodily injury. This breadth of coverage is made explicit in condition 9 of the policy:

> The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom," in coverage B include damages for care and loss of services and damages for which the insured is liable by reason of suits or claims brought against the insured by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment.

Consistently, exclusion (c), relating to liability assumed by the insured under a contract, expressly exempts from its scope liability to indemnify under the *Ryan* doctrine. Unlike the Travelers policy, the Home policy is aimed specifically at liability resulting from employees' injuries.

In denying coverage, Home relies on the "Exclusion of Maritime Liability Endorsement," which reads:

> It is agreed that the policy does not apply to injury, including death resulting therefrom, sustained by a master or a member of the crew of any vessel or by any person in the course of an employment subject to the United States Longshoremen's and Harbor Workers' Com-

pensation Act, U.S. Code (1946) Title 33, Sections 901-49.

Home argues that this exclusion excludes both direct liability to employees covered by the Longshoremen's and Harbor Workers' Act and *Ryan* warranty liability originating in injuries to such employees.

As we read the maritime exclusion, however, it is somewhat narrower than the insuring language and may be read as excluding only direct liability to an employee covered by the Longshoremen's and Harbor Workers' Act. The words "the policy does not apply to injury" are ambiguous as applied to liability under the *Ryan* doctrine, which arises not directly from the injury, but from breach of a warranty obligation. The exclusion may reasonably be read as only a counterpart of Coverage A, providing Workmen's Compensation coverage — as an exclusion of coverage for liability directly to the employees for maritime injuries, either under the Act or apart from it — and not as an exclusion of *Ryan* indemnity liability. We conclude that, in view of the clear thrust of those portions of the policy providing coverage both for direct liability to employees and for indemnity liability originating from employees' injuries and in view of the uncertain application of the maritime exclusion to indemnity liability, the policy must be construed as providing coverage for indemnity liability originating from an employee's maritime injuries. If an exclusion is to take away what the insuring language provides, it must do so in unmistakably clear terms. Accordingly, we hold

the Home policy does cover Yo-Ro's liability to Jahncke within its liability limits.

The judgment of the district court is AFFIRMED in part and REVERSED in part. Costs are taxed equally against Yo-Ro and Home.

Adm. Office, U.S. Courts

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19 72

No. 72-3316

D. C. Docket No. CA 69-325 "I"

WILSON J. PARFAIT,

Plaintiff,

versus

JAHNCKE SERVICE, INC.,

Defendant-Third Party Plaintiff-Appellee,

YO-HO DIESEL SERVICE, INC.,

Third Party Defendant-Fourth Party Plaintiff-Appellee-Appellant,

HOME INDEMNITY COMPANY,

Third Party Defendant-Appellee,

THE TRAVELERS INDEMNITY COMPANY,

Fourth Party Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part;

It is further ordered that costs on appeal are to be taxed equally against Yo-Ho Diesel Service, Inc. and Home Indemnity Company.

August 31, 1973

Issued as Mandate:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 72-3316

WILSON PARFAIT,

Plaintiff

versus

JAHNCKE SERVICE, INC.,

Defendant-Third Party
Plaintiff-Appellee,

ROBERT E. RUPPEL d/b/a
YO-RO DIESEL SERVICE, INC.,

Third-Party Defendant-
Appellee-Appellant

THE TRAVELERS INDEMNITY COMPANY,

Third-Party Defendant-Appellant

HOME INDEMNITY COMPANY,

Third Party Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF LOUISIANA

PETITION FOR REHEARING ON BEHALF OF ROBERT RUPPEL D/B/A YO-RO DIESEL SERVICE, INC. THIRD-PARTY DEFENDANT-APPELLEE, APPELLANT

WALTER F. GEMEINHARDT
1328 National Bank of Commerce Bldg.
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Yo-Ro Diesel Service, Inc.

PETITION FOR REHEARING

Now into Court, through undersigned counsel, comes Robert Ruppel, d/b/a YO-RO DIESEL SERVICE, INC., who is aggrieved by the judgment of this Court, and respectfully submits that its decision should be amended to show that the policy of insurance issued by Travelers Indemnity Company to Robert Ruppel, d/b/a Yo-Ro Diesel Service, Inc. did provide coverage and/or that a rehearing be granted herein on said issue.

Petitioner requests that it be granted a rehearing in this matter for the following reasons:

(A) The settlement by Parfait and Jahncke, was not submitted to Yo-Ro, and Yo-Ro was not timely advised or aware of negotiations with a reasonable opportunity to defend in accordance with due process of law.

(B) The record is bare of testimony of oil on the catwalk except for the perjured and impeached testimony of Parfait, which should be rejected under equity principles.

(C) Yo-Ro's obligation of a warranty of work in a workmanlike manner, is an exception to the exclusion.

(D) Yo-Ro paid for two insurance premiums and were entitled to a defense, and should not be assessed with costs, and is entitled to attorney's fees and damages because of the failure of the insurers to defend.

Accordingly, it is requested that the attached memorandum be considered in support of this Petition for Rehearing.

Respectfully submitted,

Walter F. Gemeinhardt

WALTER F. GEMEINHARDT
Attorney for Robert Ruppel d/b/a
Yo-Ro Diesel Service, Inc.

(A) THE SETTLEMENT WAS NOT SUBMITTED TO YO-RO AND YO-RO WAS NOT TIMELY ADVISED OR AWARE OF NEGOTIATIONS WITH A REASONABLE OPPORTUNITY TO DEFEND

On Page 6 of the Court's opinion, the Court stated that Yo-Ro did object to the reasonableness of the settlement which was made on the morning of trial. This was on the morning of trial when Yo-Ro was advised that the matter had been settled. This was at an inopportune time for the Third-Party Defendant to assume a defense. An objection was urged immediately, (T-239), when communications were made to the Court, and for the first time, Yo-Ro became aware of the settlement figure. The law is clear that the settlement must be reasonable and communication made to the Third-Party Defendant, Yo-Ro. Is it reasonable for a settlement to be made on the morning of trial and expect the Third-Party Defendant to defend? What about the witnesses which Third-Party Defendant had not subpoenaed? Is the Third-Party Defendant obliged to make a defense that the Defendant would make? Must he prepare two separate cases? Isn't it a fact that it would be more reasonable for the Third-Party Defendant to have some knowledge in advance, so that he would have a reasonable opportunity to consider defending and establish a defense? It is most unreasonable for Yo-Ro to have to prepare to defend Yo-Ro's defense and then at an inopportune and unreasonable time to assume a defense by Jahncke on the eve of trial!

The record is clear, (T-239), that the proposed settlement was not communicated to the Third-Party Defendant Yo-Ro, and Yo-Ro never did approve (T-383) the settlement.

These are elements of unfairness to the indemnitor, particularly, when you have a secret settlement by Jahncke when they tendered the settlement figure to Parfait, without knowledge to Yo-Ro, and got Parfait to change his testimony, which the Court admits was impeached. This is indeed bad law for the indemnitee to make secret arrangements with the plaintiff, and literally dangle the settlement figure in front of his face, and refuse to deliver the proceeds until after plaintiff changes his testimony, and so testifies under oath and gives perjured testimony, which the Court acknowledges was impeached. These are elements of distinct unfairness to the indemnitor and creates hazardous situations and is bad law.

On page 3, of the District Court's opinion, the Court acknowledges as follows:

> "The Jahncke employees disconnected a fuel line from which fuel oil was allowed to drip and accumulate on the catwalk adjacent to the engine, creating a dangerous condition."

Inasmuch as the Jahncke employees disconnected the fuel line and permitted the fuel oil to drip and accumulate on the catwalk adjacent to the engine, then it is submitted that they have created the dangerous condition and are the real tort feasor. It is incongruous that Jahncke should be permitted to be reimbursed when they are the ones that created the alleged condition, which the Court has acknowledged to be a dangerous condition. Particularly, the employees of Jahncke continued to work with Parfait, (T-312), and should be charged with the knowledge of the alleged oil drips.

The absurdity of the testimony is reflected by the Court stating Parfait's testimony was impeached but, "the two Jahncke men said the oil on the upper deck was clear of Parfait's path." Since the Court has chosen to believe the testimony of the two Jahncke men it is important to accept all of their testimony, including the facts that Parfait couldn't have gotten oil on the lower deck as the fuel lines were disconnected. They wanted to make sure the areas were cleaned because they feared a possible fire, and it was spic and span. There was no oil on the catwalk as the fuel line was closed down. (T-65, T-254, T-73, T-76)

JAHNCKE EMPLOYEES AND PARFAIT'S SON TESTIFY THAT THE AREA BY CATWALK WAS CLEAN

Willie E. Gordon, testified he walked on the catwalk area and saw no oil (T-254).

"Q. And you never noticed any oil drips...?
A. No, sir.."

Further, the fuel lines were down and the valves were turned off to keep the oil from coming out. If the valves were not turned off, fuel would have been streaming out. (T-259). Any residue would go down the side of the engine. (T-273).

Also, Wilson Parfait, Jr., his son, stated he remained in the area by the catwalk to disconnect electrodes and didn't see any fuel oil (T-320) and others walked by (T-351) and knows there was fuel oil right where he slipped. (T-328 and T-329).

It is most logical the plaintiff slipped in fuel oil where the men cleaned the parts rather that from fuel oil by the catwalk area.

W. Gordon, (T-254) - No oil in area by the engine,

would have to walk about 12 feet after leaving the ladder to go to the washbasin (T-256). Further, Jahncke's men were present at all times (T-287) and they cleaned the parts and were checking the welding.

The Court acknowledges that the law described in Tankrederit Gefion A/S Hyman-Michaels Co., (6th Cir. 1969), 406 F.2d 1039, was not complied with. The Court acknowledges that the General Rule of the Sixth Circuit is to the effect that the indemnitee, Jahncke, must show actual liability to recover against an indemnitor, Yo-Ro. Why should Yo-Ro have to pick up the tab of Jahncke, when Jahncke decides to make a settlement without communicating this amount to Yo-Ro? Also, particularly, when the defense is offered on the eve of trial, and Yo-Ro does not have a reasonable time within which to take over the defense. The Court acknowledges at page 16, as follows:

> "The only variation from Tankrederit Gefion procedure was the failure of Jahncke to tender the final settlement to Yo-Ro for approval. In view of Yo-Ro's awareness of the progress and its failure to object to the settlement on the terms contemplated, we do not view this omission as serious..."

The Court is in error when it states that Yo-Ro failed to object to the settlement. Yo-Ro did urge an objection, and further, Yo-Ro could not object without the necessary information disclosing the terms of the settlement. A secret settlement was made in the principle amount of $74,635.84, (T-547), but communications of the amount of the settlement by the plaintiff and Jahncke were not disclosed until the morning of trial (T-239), and it was immediately urged as being objectionable by Yo-Ro, (T-239).

Thus, the Court was in error when the Court stated Yo-Ro did fail to object to settlement. The record is replete with Yo-Ro's objections to the settlement. Furthermore, Yo-Ro never had any reasonable opportunity to object to the terms of the settlement. Furthermore, Yo-Ro obtained no concrete information from Jahncke as to the proposed settlement. Further, as of the morning that Yo-Ro went to trial, on Monday, January 24, 1972, Yo-Ro and Travelers and Home, were in the dark about any settlement. Reference is made to the sole communication by Jahncke to Yo-Ro, by the letter dated January 20, 1972, (Jahncke #4), inviting Yo-Ro to take over a defense on a case fixed for trial for January 24, 1972. Is this reasonable notice? Can any attorney be expected to take over a defense over the weekend? Every Court in the land gives a defendant the opportunity to defend on issues, without having to take over the defense of someone else without reasonable notice. Yo-Ro should not have to defend Jahncke for oil drips caused by Jahncke.

In connection with small claims, the First City Court allows the defendant to have at least five days to answer. The District Courts in the State of Louisiana permit the defendant fifteen days to file pleadings. When the offer of a defense was made on January 20, 1972, counsel for Jahncke deemed it such an emergency that a letter was sent (by hand) offering a defense. Shouldn't Yo-Ro have a reasonable opportunity to notify their insurers? Shouldn't Yo-Ro have an opportunity to subpoena witnesses of Jahncke if they were going to take over the defense of Jahncke?

Should Yo-Ro be the scapegoat and have a defense dumped on it on the eve of trial without having an opportunity to defend?

It is submitted that the tender of defense was made on the eve of trial and that Yo-Ro did not have an opportunity to defend the issues of Jahncke.

Accordingly, Whisenant v. Brewster-Bartle Offshore Co., 446 F.2d 394 (5th C.C.A., July 20, 1971), rehearing and rehearing en banc, denied September 29, 1971, is applicable, and the entire Court, en banc, decided that:

> "The settlement with the heirs of deceased by the barge owner without tendering proposed settlement to the drillpipe testing company for approval, or offering it the opportunity to defend the action, required remanding such phase of the case for further proceedings."

Thus, the Court erred when it stated that "Yo-Ro was continuously informed of the settlement negotiations in progress." The evidence reveals, Exhibit(Jahncke #4), that this exhibit is dated January 20, 1972, and it is on the eve of trial, which is the sole communication that Jahncke had with Yo-Ro's attorney. This indeed is unreasonable notice, particularly, when it was a bald statement stating that negotiations would be made for settlement over the weekend. Particularly, when a figure was never mentioned, in spite of the fact that Parfait and Jahncke must have reached a figure to be able to communicate to the Court on Monday morning that a settlement was made over the weekend. Thus, the Court is in grievous error when it states that Yo-Ro failed to object to the settlement on the terms contemplated, when the terms were not announced until the

morning of trial, at which time Yo-Ro stated that they objected to the terms of the settlement.

Finally, the Whisenant case, supra, and Tankrederit Gefion case, supra, were not followed, as the Court has stated in its opinion, page 14, as follows:

> "We have approved the view of the Fourth Circuit expressed in Jennings v. U.S., 4th CCA, 1967, 374 F.2d, 983, 986 that: 'The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and an opportunity to defend are the indispensable due process satisfying elements.'"

Thus, the opportunity to defend is missing, and counsel certifies that he did not have the reasonable opportunity to defend, was unable to defend, when a communication was made on the eve of trial, January 20, 1972, and further, reasonable circumstances existing are patently manifested with Jahncke dangling the settlement figure in front of Parfait, to get Parfait to admittedly change his perjured testimony, which the Court acknowledges was impeached.

Why did Parfait change his testimony? It is quite obvious that he changed it because of the fact that Jahncke made an agreement with him, without notification to Yo-Ro.

Does the Court condone such subterfuge?

It is respectfully submitted that the Third-Party Defendant, Yo-Ro, should not be obliged to assume the defense under such circumstances, particularly, on the eve of trial.

Therefore, the indemnitor cannot be bound by the indemnitee's unilateral acts, particularly, inasmuch as reasonable notice was not afforded to Yo-Ro, and a rea-

sonable opportunity to defend was not afforded, all of which constitutes a lack of due process, in accordance with the doctrine expressed in Jennings v. U.S., 4th CCA, 374 F.2d 983.

Likewise, the Court erred when it stated (T-17) of the slip opinion, as follows:

> "The Appellants urge that the amount of the settlement was excessive, because if the claim had been tried, contributory negligence of the plaintiff would have diminished the amount of recovery by a fraction approaching one hundred percent. We cannot say, however, that the contrary finding of the district court was clearly erroneous."

Isn't it a fact that the Court may make a review of the findings of fact in order to ascertain that the District Court did not err? The Court may examine to ascertain that an evidentiary basis existed and was the cause of the accident. The Court has come to the conclusion that an accident occurred and certainly the facts leading to these conclusions may be examined. In order to come to the conclusion that an accident occurred, it is quite obvious that the Court considered that Parfait was walking on the upper deck when he slipped, and the Court could assess him with contributory negligence. Alternatively, if Parfait stood in oil on the lower deck, wouldn't he be contributory negligent? A third person cannot recover when injured by his own negligence. Hill v. Flota Mercante Grancolombiana, 405 F.2d 878 (5th C.C.A.)

The Court may examine the evidentiary basis, and it is submitted that this function of the Court would not be exhausted until the Court considered the evidence which

would justify the conclusion that Parfait did slip on the upper deck. The two factors are concomitant with each other. See 81 ALR 2D 1174.

Particularly, it should be recalled that this was not a jury verdict, and the Court did look at the evidence.

Also, see Grigsby v. Coastal Marine Service of Texas, Inc., (5th Cir. 1969), 412 F.2d 1011, in which the $90,000.00 award to the widow and two minor daughters was remanded for an increase in the award, "independent of what Louisiana judges have awarded or its appellate courts have sustained."

Further, Parfait was aboard to repair a temporary condition when Parfait was the specialist. As a third person and specialist, he is not entitled to a warranty of seaworthiness or the Jones Act benefits. The Fifth Circuit Court of Appeals, in Hill v. Flota Mercantile Grancolombiana, 405 F.2d 878 (5CCA, 1969), held a third person could not recover when he has been injured solely by his own negligence or his own irresponsible act. (Presupposing the Court feels Parfait stood in oil).

Therefore, it was unreasonable for Jahncke to settle with Parfait, when Parfait couldn't have recovered from Jahncke because of his own negligence. By analogy, if Parfait hurt a co-employee, the latter could not recover as this would be operational negligence. Usner v. Luckenbach Overseas Corp., U. S. Supreme Court, 40-October term, 1970.

Also, that Parfait had the burden of proof and with his impeached testimony, the plaintiff couldn't sustain his burden. Jahncke owed no warranty of seaworthiness to a noncrew member regarding a transitory condition created by Parfait. Patterson v. Humble Oil & Refining Co.,423 F.2d 883, (5th CCA, 1970).

(B) THE RECORD IS BARE OF OIL ON CATWALK EXCEPT FOR PERJURED AND IMPEACHED TESTIMONY OF PARFAIT WHICH SHOULD BE REJECTED UNDER EQUITY PRINCIPLES.

Assuming Jahncke's men permitted oil to drip, the real fault should lay on Jahncke. This conduct on the shipowner, who is obliged to furnish a safe place to work, is sufficient to preclude indemnity. Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563, 567, 78 S.Ct. 438. The default of Jahncke employees would have had to have caused the oil drips and should preclude indemnity. Italia Societa v. Oregon Stevedoring Company, 376 U.S. 315, 324, 84 S.Ct. 748, 754.

The Court has acknowledged that Jahncke had an unseaworthy vessel, (Court of Appeals, Opinion, T-15), when it stated the accumulated oil on the catwalk beside the engine constituted an unseaworthy condition which was the proximate cause of the accident. Equity should also inure to Yo-Ro for this unseaworthy condition, which the Court admits does exist. Where is the Equity for Yo-Ro? ? ? Particularly, when the warranty does not extend to specialized services. Ryan Stevedoring Co. v. Pan Atlantic, 350 U.S. 124, 76 S.Ct. 232.

Under such circumstances, the basis for liability appears questionable and therefore, actual liability should be required where there is perjured and impeached testimony. Whisenant v. Brewster Bartle Offshore Co., 5th CCA, 446 F.2d 394, 403.

The Ryan warranty due by Yo-Ro is that the performance of the welding operation will be proper and safe. Alter-

natively, the facts show that Jahncke men stated the fuel lines were disconnected, they feared fire, and the area was spic and span. (supra)

Therefore, the Court errs, when the statement is made there was oil on the catwalk which can only be concluded, if the perjured and impeached testimony of Parfait is not rejected.

(C) YO-RO'S OBLIGATION OF A WARRANTY OF WORK IN A WORKMANLIKE MANNER IS AN EXCEPTION TO THE EXCLUSION

Exclusion (a) is the "assumed liability exclusion." Ryan indemnities are expressly omitted from that exclusion. That is made explicit by the words "this exclusion does not apply to a warranty that such work will be done in a workmanlike manner."

Exclusion (h) and the preceding exclusion (g) deal with bodily injury to employees where a compensation remedy is available (g) and where such a remedy is not available (h). The phrase concerning liability assumed under an incidental contract, found at the end of exclusion (h), merely is a reference back to the "assumed liability exclusion" which, by definition, does not include Ryan indemnities. In other words, the whole of exclusion (a) is understood to be included in that final phrase of exclusion (h). That final phrase only emphasizes that exclusion (h) does not deal with contractual liabilities.

In its original opinion, this Court distinguished Indemnity Insurance Company vs. California Stevedore & Ballast Company, 307 F.2d 513 (CA 9, 1962) saying that the policy language in that case was significantly different.

Yo-Ro fails to see the significance of any difference in the language in the two policies, but nonetheless, it has found a later case in which the policy language is almost identical to exclusion (h) here and in which California Stevedore was followed. Zidell vs. Travelers Indemnity Company, 264 F.Supp. 496 (D.C. Oregon 1967). In that case, like the California Stevedore case, it was held that the exclusion referring to bodily injury to any employees refers to tortuous, not contractual, liability.

As the Court itself says, in another portion of the opinion (p. 24), "If an exclusion is to take away what the insuring language provides, it must do so in unmistakably clear terms." There can be no mistake that exclusion (a) leaves Ryan indemnities insured; it can hardly be said that exclusion (h) takes that insurance away in unmistakably clear terms.

THE COURT ERRED WHEN IT STATED THAT THE APPLICABILITY OF LARSON CONSTRUCTION CO. V. OREGON AUTOMOBILE INS. CO., 9TH CCA, 1971, 450 F.2d 1193 IS DOUBTFUL BECAUSE ONLY BRIEF FRAGMENTS OF THE INSURING AND EXCLUSIONARY LANGUAGE ARE QUOTED IN THAT OPINION

The essentials are within the opinion, and it is inapt to believe that the substance of the decision was excluded. The substance is defined specifically under Coverage A - Bodily Injury Liability. At 450 F. 2d 1194, the Court states that the policy excludes from this coverage:

> "(c) * * * bodily injury of an employee of an insured arising out of and in the course of * * * employment by an insured * * *"

The Court then stated that as a prelude to making a search for the meaning, that a stevedore has been liable

to indemnify the shipowner sued by the stevedore's employees injured aboard that ship since Ryan v. Atlantic, supra. Further,

> "This risk is one of the facts of life in the insurance business and is the kind of risk that the prudent stevedore would insure. In this connection we note that the policy involved is described as a "comprehensive liability policy."

Further,

> "We emphasize the fact that there was no contract between Larson and Shaver and that Larson's liability to Shaver must rest upon something other than words passing between them or conduct of one directed to the other."

The Court considered specifically exclusion (c) which provided:

> "* * * bodily injury of an employee of an insured arising out of and in the course of employment by an insured * * *"

This is the gravamen, the sum and substance of the matter under consideration, and it is the heart and soul of the Larson case, and the case at bar.

LANGUAGE CONTAINED IN LARSON POLICY:	LANGUAGE CONTAINED IN YO-RO'S (TRAVELERS) POLICY:
"Coverage A-Bodily Injury Liability. The policy excludes from this coverage: (b) * * * liability assumed by an insured under any contract or agreement * * *; (c) * * * bodily injury of an employee of an insured arising out of and in the course of * * *employment by an insured* * *"	"Coverage A-Bodily Injury Liability. This insurance does not apply: (h) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured."

In the Larson case, supra, the Court stated:

> "The problem here arises because the exclusion does not refer to all sums which the insured shall become legally liable to pay as damages because of

> bodily injury liability, but simply makes the coverage inapplicable to ".. bodily injury to any employee." As we see it, the language of the exclusion is somewhat narrower than the language of the insuring clause and while the meaning is not clear, the exclusion could be interpreted to refer to no more than the damages suffered by the employee himself. Because of workmen's compensation and similar laws, the employee presents a special kind of risk ordinarily insured by a special policy devoted exclusively to that risk, or in some cases by deposits ordered by the officers administrating the workman's compensation or similar law. A person examining exclusion (c) might reasonable believe that it was intended to exclude only that special employee hazard normally covered by that special policy. In view of the special treatment of the employee hazard, the differences between the words used in the insuring and the exclusion clauses and the fact that the risk was a known risk, we hold that the exclusion (c) was not spelled out with sufficient certainty to eliminate the coverage in this case."

Continuing, the Court stated:

> "The result which we reach is in accord with, although not compelled by, the decision in Indemnity Ins. Co. v. California Stevedore & Ballast Co., 307 F. 2d 513 (9th Cir. 1962). In that case the Court relied upon the existence of a contract between the stevedore and shipowner and a clause in the policy assuming liability under written contracts. There is no contract here. Notwithstanding, we hold that if the liability of the stevedore to the shipowner is not to be insured in a comprehensive liability policy then that risk should be excluded in unmistakable terms no matter what words may be used to rationalize the imposition of the stevedore's liability.

Accordingly, it is requested that the District Court's judgment holding that the policy of Travelers covered Yo-Ro's obligation, be reinstated.

(D) YO-RO IS ENTITLED TO ATTORNEY'S FEES BECAUSE OF THE FAILURE OF THEIR INSURERS TO DEFEND, AND SHOULD NOT BE ASSESSED WITH COSTS

You will recall that it was stipulated that Travelers and Home were both put on notice, and refused to defend the claim, coverage was denied, and a defense was refused. (T-422). Yo-Ro occupies an unfortunate position of paying insurance premiums, and having neither one of the insurers come forth and represent them in accordance with their obligations to defend Yo-Ro. Further, the District Court held that:

> "It is further ordered that if the parties do not agree, within sixty days of the date of the filing of this judgment, on the amount of expenses and costs of defense, including reasonable attorneys fees, as awarded herein, any party may, upon written motion, apply to the Court for a hearing to determine these amounts."

The Court was silent as to attorneys fees and did assess costs to be equally divided with Yo-Ro and Home. It is respectfully submitted that Yo-Ro was an innocent policy holder, and under the obligations, the insurers were obliged to defend.

Accordingly, Coverage A - Bodily Injury Liability provides:

> "The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of Coverage A - bodily injury ...caused by an occurrence, and the Company shall have the right and <u>duty to defend</u> any suit against the insured seeking damages on account of such bodily injury..."

Further, the same provisions make it mandatory for Home to defend, and Yo-Ro should not have been obliged to incur attorney's fees to defend.

Home Indemnity's policy, Yo-Ro #3, provides the obligation to:

> "(a) defend any proceedings against the insured's seeking such benefits and any suit against the insured alleging such injury and seeking damages on account thereof..."

Accordingly, Travelers and Home, individually or collectively, owed a policy defense to Yo-Ro. The language contained in Boutwell v. Employers Liability Assurance Corp., (5th CCA), 175 F. 2d 597, is applicable:

> "Even though a complaint against the insured asserts a cause of action upon various grounds which are not within the coverage of the policy, the duty to defend arises from any allegations setting forth the cause of action which might be within the coverage."

Accordingly, it is submitted that Yo-Ro should not be assessed with costs of Court, when they in good faith believed that they had insurance.

The determination of the amount of Attorney's fees to award the insured, because of the arbitrary failure of the insurer to pay, is within the trial judge's discretion so long as the fees set are reasonable.

> See State Farm Fire & Casualty Co. v. McFerran, 382 F.2d 282, Cert. denied, 88 S.Ct. 1045, 390 U.S. 953, 19 L.Ed.2d 1145. Also, see Hinson v. British America Ins. Co., 43 F.Supp. 951, and R.S. 22:657, where penalty fees, and attorney's fees and interest were allowed.

It is respectfully submitted that the Travelers Insurance Company is responsible, and has afforded coverage, and that reasonable attorney's fees should be assessed against Travelers and Home Indemnity, and further, that the plaintiff, Parfait, failed to sustain his burden of proof, due to his inconsistent and irreconcilable testimony, and the sole way that the Court could believe that there was

oil by the catwalk, would be to believe the perjured and impeached testimony of Parfait, which was unworthy of belief.

Further, if the Court adheres to the fact that there was oil on the catwalk, the oil was due to the employees of Jahncke, which therefore made the vessel unseaworthy. Equity demands that Jahncke be assessed with liability, and Jahncke should have afforded Parfait with a safe place to work.

Further, Jahncke failed to justify the settlement as being reasonable by not timely and reasonably offering Yo-Ro to participate in the proposed settlement, or communicating the terms of the settlement until the morning of trial, when it was too late. Further, immediately upon hearing of the proposed settlement, it was objected to by Yo-Ro's attorney in Open Court, which is a matter of record.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing Petition for Rehearing has been served on opposing counsel of record, by depositing same in the United States Mail, postage pre-paid.

New Orleans, Louisiana, this 28 day of September, 1973.

W. F. Gemeinhardt

WALTER F. GEMEINHARDT

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3316

WILSON J. PARFAIT,

Plaintiff,

versus

JAHNCKE SERVICE, INC.,

Defendant-Third Party
Plaintiff-Appellee,

YO-RO DIESEL SERVICE, INC.,

Third Party Defendant-
Fourth Party Plaintiff-
Appellee-Appellant,

HOME INDEMNITY COMPANY,

Third Party Defendant-
Appellee,

THE TRAVELERS INDEMNITY COMPANY,

Fourth Party Defendant-
Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

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2 W. J. PARFAIT v. JAHNCKE SERV., INC., ET AL.

ON PETITION FOR REHEARING
(Opinion Aug. 31, 1973, 5 Cir., 1973, ____ F.2d ____).

(October 24, 1973)

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM: In its petition for rehearing, Yo-Ro Diesel Service, Inc. raises four points. The first three concern the reasonableness of its opportunity to defend, the fact finding that there was oil on the catwalk, and the construction of the exclusionary clause in the Travelers insurance policy. We think our original opinion adequately disposes of these issues.

Point four of the petition, however, raises the issue of costs of the defense, including attorney's fees. The district court had awarded these costs against Travelers and allowed the parties sixty days from the date of the judgment to agree on their amount. In the absence of an agreement, any party was invited to apply to that court for a hearing to determine the amount. We have reversed as to the liability of Travelers and as to the nonliability of Home, but we have not dealt with the issue of the costs as a matter of contractual liability under the policies.

Both the Home and the Travelers policies contain clauses obligating the insurers to bear the costs of defense to suits on claims covered by the policies. It is probable that both insurers are therefore liable for

the costs of this suit, including attorney's fees, even though only Home has been held liable for the basic claim, since there was a reasonable possibility that each policy might have covered this claim. See J. Appleman, Insurance Law and Practice, § 4683 (1962). Although this issue has been raised by Yo-Ro in its brief, neither Home nor Travelers has argued it. We could, of course, grant the petition for rehearing on this point, hear further argument on it, and remand to the district court for a determination of the amount of any defense costs we determined might be allowable. In the interests of judicial economy, however, we feel that the most expeditious way to handle this whole issue is to remand to the district court for a hearing on both the existence of liability for costs on the part of either Home or Travelers or both and the amount of those costs.

The petition for rehearing is DENIED and the case is REMANDED for a hearing on these issues.

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